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Worker Participation: Industrial Democracy and Managerial Prerogative in the Federal Republic of Germany, Sweden and the United States

By LAURENCE S. ZAKSON

Member of the Class of 1985

I. INTRODUCTION

In light of the recent economic difficulties and consequent dislocation of employees experienced by United States industry, the concern of American workers with having a voice in corporate or industrial affairs has expanded from an interest in wages, hours, seniority and other traditional areas to include interests in job security and corporate and managerial decisions affecting closing and relocation of facilities, layoffs and other matters covering the whole of the working environment.¹ Despite manifestations of such concern, however, many unions have found the

1. Two recent incidents illustrate this interest. The first is the case of First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981), in which the amicus curiae brief filed by the AFL-CIO and the United Auto Workers (UAW) referred to the fact that "[t]he AFL-CIO and the UAW are vitally interested" in which subjects fall within the scope of required bargaining and, in particular, in "the problem of plant closings and economic dislocation." Amicus Curiae Brief, AFL-CIO, UAW at ii, First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981). The brief also sets out the degree to which the UAW and Chrysler Corporation had been successful in bargaining about such traditionally managerial decisions. *Id.* at ii-iii. The second incident is the recent ratification of the 1982 Ford-UAW agreement which grew out of negotiations between the UAW and Ford Motor Co. in 1979. The agreement provides for a broad pilot program of employee involvement. This effort, which entails an ongoing process of worker input, is referred to by the UAW-Ford National Joint Committee on Employee [sic] Involvement as "encouragement to all employees [sic] to become involved in and to personally contribute to: their jobs, group efforts, quality products, . . . improvements in the working environment, and to the success of the Union and the Company." Letter 3 from the UAW-Ford National Joint Committee on Employee [sic] Involvement to Ford Motor Co. Plant Industrial Relations Managers, Presidents, Building Chairmen, and Recording Secretaries of all Ford Local Unions in the U.S. (Sept. 19, 1980) (available on request from Vice President for Labor Relations, Ford Motor Co.). See also BUREAU OF NATIONAL AFFAIRS, SUMMARY REPORT FOR 1982: LAYOFFS, PLANT CLOSINGS AND CONCESSION BARGAINING 3 (1983); INSTITUTE OF GOVERNMENT STUDIES, UNIVERSITY OF CALIFORNIA, BERKELEY, CALIFORNIA DATA BRIEF 1 (Sept. 1983) (citing EMPLOYMENT DATA & RESEARCH DIVISION, CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, CLOSED BUSINESS IN CALIFORNIA:

search for participation by workers in work environment decisions to be unsuccessful. In one recent and typical National Labor Relations Board (NLRB) case,² a plant closing decision by a major United States corporation—a decision which would have the effect of devastating the local economy—was determined by the NLRB to be beyond the reach of “the code of laws in our nation.”³ This determination effectively prohibited legal industrial action by the workers to safeguard their jobs or their community.

In contrast, most modern West European countries have systematic worker participation plans that recognize and provide for participation by workers and their unions in a broad range of managerial and corporate decisions.⁴ While such plans are referred to by such diverse names as codetermination, joint regulation, industrial democracy and worker participation,⁵ their goal is essentially the same: to provide workers with a greater voice in the direction and vital decisions of the enterprise for and in which they work.⁶ The Commission of the European Communities has described the underlying rationale of such participation mechanisms as follows:

[I]ncreasing recognition [is] being given to the democratic imperative that those who will be substantially affected by decisions made by social and political institutions must be involved in the making of those decisions. Employees not only derive their income from enterprises which employ them, but they devote a large proportion of their daily lives to the enterprise. Decisions taken by or in the enterprise can have a substantial effect on their economic circumstances, . . . [and] their health and physical condition⁷

FEBRUARY 1980—MAY 1983 (June 10, 1983)); Note, *Advantages and Limitations of Current Employee Ownership Acts to Workers Facing a Plant Closure*, 36 HASTINGS L.J. 93 n.2 (1984).

2. *United Steelworkers of America Local 1330 v. United States Steel Corp.*, 103 L.R.R.M. (BNA) 2925 (N.D. Ohio 1980).

3. *Id.* at 2932.

4. Sweden, the Federal Republic of Germany, Norway, Austria, Denmark, Luxembourg and the Netherlands all employ such schemes. J. FURLONG, *LABOR IN THE BOARDROOM* 1 (1977). The European Economic Community also has a uniform worker participation proposal for member states. *Proposal for a Fifth Directive on the Structure of Sociétés Anonymes*, BULL. OF THE EUR. COMM., Supp., at 8-9 (Oct. 1972).

5. For a discussion of several of these terms and their use, see H. JAIN, *WORKER PARTICIPATION SUCCESS AND PROBLEMS* 3-20 (1980); S. PEJOVICH, *THE CODETERMINATION MOVEMENT IN THE WEST* vii (1978); J. FURLONG, *supra* note 4, at 1.

6. See, e.g., SWEDISH INSTITUTE, *FACT SHEETS ON SWEDEN, LABOR RELATIONS IN SWEDEN* 3-4 (Feb. 1983); Meissel & Fogel, *Codetermination in Germany: Labor's Participation in Management*, 9 INT'L LAW. 182 (1975) (quoting Inaugural Address by H. Schmidt, Chancellor of the Federal Republic of Germany (May 17, 1974)).

7. *Employee Participation and Company Structure in the European Community*, BULL. OF THE EUR. COMM., Supp., at 9 (Aug. 1975) quoted in S. PEJOVICH, *supra* note 5, at 4.

As a result, many European workers not only "are helping to decide such mundane matters as coffee-break provisions, they are also . . . [deciding] such major matters as approving or rejecting big capital spending projects."⁸

This Note will examine some of the historical, political and legal forces underlying the concepts of industrial democracy, worker participation and managerial prerogative in two Western European nations, Sweden and the Federal Republic of Germany, and in the United States. It will examine the mechanics of worker participation systems in each of these nations, discuss their "transferability" and apply these mechanisms to a hypothetical situation. Ultimately, it will argue that the accommodation of the conflicting interests arrived at by the European nations can be used as a model of accommodation of worker participation interests and owner prerogatives to achieve a more expansive scope for mandatory collective bargaining within the United States collective bargaining arena.

II. NATIONS SELECTED FOR COMPARISON

A. The United States

In the United States, efforts to afford workers the opportunity to participate in decisions affecting worker interests may face significant difficulties. In a recent decision interpreting the National Labor Relations Act (NLRA),⁹ *First National Maintenance Corp. v. NLRB*,¹⁰ the United States Supreme Court restricted the scope of mandatory bargaining¹¹ so as to make collective bargaining agreements regarding such decisions as plant closings and, perhaps, relocations, more difficult for unions and workers to secure. This case indicates that many of the "core" managerial decisions having broad implications for workers and their job security, the same decisions in which workers and their unions have been expressing a desire to participate, may be excluded from the scope of mandatory bargaining. One of the primary arguments for limiting the scope of mandatory bargaining is based on the concept of "managerial prerogative."¹² This limitation has the effect of making agreements on such subjects, for all practical purposes, entirely dependent on the em-

8. J. FURLONG, *supra* note 4, at 1.

9. National Labor Relations (Wagner) Act, 29 U.S.C. § 151-69 (1982).

10. 452 U.S. 666 (1981).

11. Mandatory bargaining is, *inter alia*, that type of collective bargaining for which workers may use economic sanctions to induce negotiations. See *infra* text accompanying notes 28-34.

12. See *infra* text accompanying notes 32-48.

ployer's desire to discuss the subject, rather than on the ability of the parties to introduce the topic through the use of economic forces.¹³

B. Sweden

Sweden was chosen as a nation for comparison in this Note because, like the United States, the Swedish system puts a great emphasis on collective bargaining agents and agreements in its labor relations law.¹⁴ In addition, "Sweden is considered to have the most far-reaching program of worker participation in Europe."¹⁵

In general, the Swedish system of worker participation, *Medbestammande*,¹⁶ is designed to provide for full equality between labor and management in decision-making, but *Medbestammande* legislation does not specify how this equality is to be accomplished. "Instead, it broadly provides that individual companies and their unions must collectively negotiate rules with respect to all policies which have a bearing upon working conditions."¹⁷ It is of particular import to note here, however, that despite an affirmative duty to bargain imposed on the parties by this legislation, and despite the breadth of the scope of bargaining topics and the unprecedented quantum of information sharing required of the company by the *Medbestammande* Acts, the 1976 Act "reaffirm[ed] the employer prerogative to direct"¹⁸ in the workplace. The employer, therefore, has lost some of its unfettered discretion to make decisions, but retains, subject to its own agreement to relinquish, the ultimate power to direct the enterprise.¹⁹

C. The Federal Republic of Germany

The Federal Republic of Germany was selected as a nation for com-

13. But cf. Cox & Dunlop, *Regulation of the Collective Bargaining by the National Relations Board*, 63 HARV. L. REV. 389, 391 (1950) (seemingly arguing that unions will, through section 8(a)(5) unfair labor practice charges, seek to force management to discuss matters they lack the "economic power" to force it to discuss).

14. See generally Sigeman, *The Structure of Swedish Collective Labour Law, an Introduction*, in 1 LAW AND THE WEAKER PARTY: AN ANGLO-SWEDISH COMPARATIVE STUDY 132-42 (1982).

15. Steuer, *Employee Representation on the Board: Industrial Democracy or Interlocking Directorate?*, 16 COLUM. J. TRANSNAT'L L. 255, 263 (1977).

16. This is the Swedish word for codetermination.

17. Steuer, *supra* note 15, at 263 (footnote omitted).

18. Fahlbeck, *The Swedish Act on the Joint Regulation of Working Life*, in 1 LAW AND THE WEAKER PARTY: AN ANGLO-SWEDISH COMPARATIVE STUDY 156 (1982).

19. Cf., Anderman, *Labour Law in Sweden: A Comment*, in 1 LAW AND THE WEAKER PARTY: AN ANGLO-SWEDISH COMPARATIVE STUDY 200 (1982) ("[T]here are undoubtedly severe limitations to those positive rights created by Swedish legislation.").

parison in this Note primarily because of its long history of codetermination efforts.²⁰ It was also selected because of two immediately obvious differences from the United States. First, the labor movement in the Federal Republic is unified, highly centralized at the federal level and has a unifying ideology.²¹ In contrast, in the United States, the union local and the individual plant are much more important. Second, while employees are represented by two bodies in the Federal Republic,²² the union and the works council,²³ workers in the United States are represented by a majority union which serves as the exclusive bargaining agent for the employees.²⁴

Comparing United States and West German labor relations law in this context is helpful because of the fact that the ideological struggle and the underlying tension of demands for economic democracy and worker participation on the one hand, and the more classical liberal economic view with its emphasis on managerial prerogative as an incident of private ownership on the other hand, has been more openly and clearly articulated within the West German context than in other nations. A final reason for looking at West Germany is the fact that two of the key methods of implementing industrial democracy²⁵ have been developed and are maintained in that nation by entirely different means. Works councils are virtually universal as a worker participation mechanism in the Federal Republic because they are required by statute,²⁶ whereas collective bargaining agreements are so comprehensive largely because employers have chosen to make them so.²⁷

20. See, e.g., S. PEJOVICH, *supra* note 5, at 58-9; J. FURLONG, *supra* note 4, at 5.

21. Summers, *Worker Participation in the U.S. and West Germany: A Comparative Study from an American Perspective*, 28 AM. J. COMP. L. 367, 370 (1980).

22. For a discussion of bifurcation of worker representatives in Germany see *infra* text accompanying notes 213-22.

23. Summers, *supra* note 21, at 373. Cf. J. FURLONG, *supra* note 4, at 5-6. Works councils in Germany and Sweden are not identical, but are, in some ways similar. Both are plant-level bodies in which issues of interest to labor are discussed. Both are technically and, to a large degree, practically independent of the unions.

24. See 29 U.S.C. § 159(a) (1982).

25. The third key method, labor participation on the supervisory board, is not as universal; therefore it is not considered at this juncture.

26. Betriebsverfassungsgesetz [BetrVG] I, 1972 Bundesgesetzblatt [BGB I] I [hereinafter BetrVG 1972].

27. Summers, *supra* note 21, at 378. This is despite the fact that in Germany, as in the United States, less than 40% of all employees are union members. As to Germany, see Summers, *supra* note 21, at 379. As to the United States, see Summers, *Industrial Democracy: America's Unfulfilled Promise*, 28 CLEV. ST. L. REV. 29, 36 n.47 (1979).

III. THE SCOPE OF COLLECTIVE BARGAINING IN THE UNITED STATES

A. The Mandatory/Permissive Dichotomy

In *NLRB v. Wooster Division of Borg-Warner Corp.*,²⁸ the United States Supreme Court held that sections 8(a)(5)²⁹ and 8(d)³⁰ of the NLRA establish a mandatory duty for the employer and the collective bargaining agent of the employees to "bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment'" This duty is "limited to those subjects [set-out in section 8(d)], and within that area neither party is legally obligated to yield. As to other matters, however, each party is free to bargain or not . . . and to agree or not"³¹ Thus, *Borg-Warner* and cases following it have established a "mandatory-nonmandatory" or "mandatory-permissive" dichotomy of subjects in the collective bargaining arena.³² If

28. 356 U.S. 342 (1958).

29. Section 8(a) states that: "It shall be an unfair labor practice for an employer—. . . (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." 29 U.S.C. § 158(a) (1982).

30. Section 8(d). For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification . . . ;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes . . . ; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later. . . .

29 U.S.C. § 158(d) (1982).

31. 356 U.S. at 349. It is important to note here that the duty to bargain is not the same as a duty to agree. See 29 U.S.C. § 158(d) (1982). See also *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

32. See generally, D. LESLIE, *LABOR LAW* 203-09 (1979).

a subject is labeled mandatory, any party may insist on bargaining over it until an impasse is reached and neither party may legally refuse to discuss it.³³ If a subject is labeled permissive, neither party may insist upon discussing it nor force the other party to consider it. In addition, a finding that a subject is not mandatory means that if a party refuses to discuss the matter, the other party may not bring any economic pressure (e.g., a strike by the labor side or a lock-out on the employer side) to coerce the party which has refused to bargain into bargaining over or agreeing to the matter. The determination that a subject is permissive, therefore, has the consequence of taking such a subject outside the collective bargaining arena unless the parties voluntarily decide to discuss it.³⁴ Therefore, if unions seek to pursue worker participation as a collective bargaining goal, the attachment of the label "mandatory" or "permissive" to the subject matter of such efforts will have a marked effect on how successful their pursuit will be.

B. The Scope of Mandatory Bargaining

In *Fibreboard Paper Products Corp. v. NLRB*,³⁵ the United States Supreme Court began a process of setting out the test for whether a bargaining subject was mandatory or permissive. The issue in that case was whether contracting out part of the employer's work was a mandatory subject of bargaining. The employer sought to contract out, without bargaining, maintenance work that had to be done on the employers' premises, which had previously been done by the employer's employees. The decision to contract out was made in an attempt to save labor costs because the subcontractor's employees were paid less than bargaining unit employees. After the work was contracted out, the employer took the position that he had no further use for the maintenance employees and that negotiation of a new bargaining agreement for those employees would be pointless. The words of the NLRA at issue there were "terms and conditions of employment." The Court found it relatively easy to decide that the instant case fell within the literal words of the Act since the contracting out involved work on the employer's premises and necessarily caused termination of the affected employees.

33. Atleson, *Managerial Prerogatives, Plant Closings, and the NLRA*, 11 N.Y.U. REV. L. & SOC. CHANGE 83, 88 (1983). Cf. *NLRB v. Katz*, 369 U.S. 736, 743 (1962) (discussing the duty of bargaining and good faith). Cf. also *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

34. For a general discussion of the practical meaning of this distinction, see Atleson, *supra* note 33, at 89.

35. 379 U.S. 203 (1964).

The Court in *Fibreboard* spelled out what was in application, if not in name, an embryonic balancing test.³⁶ The purposes of the NLRA and the advantages of bringing the controversy over a "vital concern" of "labor and management within the framework established by Congress as most conducive to industrial peace"³⁷ (the interests in having the dispute settled through collective bargaining) was to be balanced against the "propriety" of requiring the employer to bargain about a matter which would "significantly abridge his freedom to manage the business."³⁸ Despite broad language in the opinion for the Court, the Court narrowly confined its holding that the subject was appropriate to the situation at hand. Justice Stewart's concurrence, which has become at least as well-known as the opinion of the Court, implied that the Court was unwilling to interpret the "terms and conditions of employment" much more expansively than it did in *Fibreboard*:

Many decisions made by management affect the job security of employees. Decisions concerning the volume and kind of advertising expenditures . . . may bear upon the security of the workers' jobs. Yet it is hardly conceivable that such decisions so involve "conditions of employment" that they must be negotiated with the employees' bargaining representative.

. . . [N]othing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control.³⁹

In 1965, about one year after *Fibreboard*, the United States Supreme Court in *Textile Workers Union v. Darlington Mfg. Co.*⁴⁰ held that "so far as the Labor Relations Act is concerned, an employer has the abso-

36. The opinion for the Court does not deal with the issue as if it were a balancing. Nonetheless, in the *First Nat'l Maintenance* decision, the Court relies heavily on *Fibreboard* and, seemingly, interprets the test advocated by *Fibreboard* as one of balancing. In addition, in at least one decision immediately subsequent to the *Fibreboard* case, a court of appeals responded to the decision as if it understood the *Fibreboard* approach as such. *NLRB v. Royal Plating and Polishing Co.*, 350 F.2d 191 (3d Cir. 1965). The preeminence of the concurrence and its emphasis on reconciling the conflicting demands of managerial rights on the one hand and the purposes of the NLRA on the other yields this conclusion as well. *Fibreboard*, 379 U.S. at 218-19. See *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108, 110 (8th Cir. 1965) (measuring the limits of the duty under sections 8(d) and 8(a)(5) by infringement on freedom of managerial decision-making).

37. 379 U.S. at 211. For a discussion of the centrality to the Act of the idea of collective bargaining, and of its role as the Congressionally determined mechanism most conducive to labor peace, see 29 U.S.C. § 151 and cases and articles cited in 1 C. MORRIS, *THE DEVELOPING LABOR LAW* 553-58 (2d ed. 1983).

38. 379 U.S. at 213.

39. *Id.* at 233 (Stewart, J., concurring).

40. 380 U.S. 263 (1965).

lute *right* to terminate his entire business for any reason he pleases, but . . . [not] to close part of a business no matter what the reason."⁴¹

When taken together, the *Fibreboard* opinion, the Stewart concurrence and *Darlington* illustrate a concept which commentators have referred to as "managerial prerogative."⁴² This concept rests on the notion that the employer is the source of all managerial powers and that all those powers not ceded in the collective bargaining agreement are retained by the employer. It refers to a sphere of decisions which are the sole or exclusive province of the management/owners of the enterprise and over which the Court is unwilling to say that the NLRA compels good faith bargaining.

C. *First National Maintenance* and Employer Prerogatives in Decision Making

The modern judicial view of the limits of the scope of mandatory bargaining and how competing interests are to be accommodated was expressed in *First National Maintenance Corp. v. NLRB*.⁴³ In that case, the employer was in the business of providing housekeeping/maintenance for commercial customers, one of which was a nursing home. As a result of a dispute between the employer and the customer, the employer terminated the service agreement with the customer. The newly certified union, upon learning of the termination of the agreement and the pending termination of the employees involved, sought to bargain with the employer about the decision. When management refused, the union filed an unfair bargaining practice charge against the employer alleging a violation of the duty to bargain in good faith under sections 8(d) and 8(a)(5) of the NLRA.⁴⁴ In the majority opinion, Justice Blackmun spelled out the test for determining whether requiring an employer to negotiate with the certified representative of its employees over a decision to close part of its business falls within the scope of mandatory bargaining under sections 8(d) and 8(a)(5) of the NLRA. The implicit balancing of *Fibreboard* is made explicit in the *First National Maintenance* decision. The Court held that while Congress did not explicitly state "what issues

41. *Id.* at 268 (emphasis added).

42. See, e.g., Atleson, *supra* note 33, at 95. See also *National Lead Co.*, 43 Lab. Arb. (BNA) 1025, 1027-28 (1964). For two relatively clear expressions of the concept in a legal context (although neither has any value as precedent), see *Chicago & N.W. Ry. v. Order of R.R. Telegraphers*, 264 F.2d 254, 258 (7th Cir. 1959), *rev'd*, 362 U.S. 330 (1960), dealing with the Railway Labor Act, 45 U.S.C. § 151-64; and Amicus Curiae Brief, U.S. Chamber of Commerce *passim*, *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

43. 452 U.S. 666 (1981).

44. *Id.* at 670.

of mutual concern to union and management it intended to exclude from mandatory bargaining,"⁴⁵ such a determination should be made "in view of an employer's need for unencumbered decision making."⁴⁶ It then stated that "bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business."⁴⁷ Finding that the "decision to halt work at this specific location represented a significant change in petitioner's operations,"⁴⁸ the Court held the employer had no duty to bargain with the employee's representative about its decision and that the decision itself was not part of section 8(d)'s "terms and conditions of employment" over which Congress mandated negotiations.⁴⁹ In brief, the test as it was applied in *First National Maintenance* boils down to a balancing test which weighs the burden of requiring negotiation on the interests of management against the benefits to "industrial peace" and to collective bargaining as a method of channeling industrial conflict. This test does not explicitly deal with the decision's effects on employees.

IV. A REVIEW OF THE WORKER PARTICIPATION MECHANISMS IN SWEDEN

A. Legislation

Since the late 1960's⁵⁰ the Swedish labor relations environment has undergone significant change in response to trade union demands for "in-

45. *Id.* at 679.

46. *Id.*

47. *Id.*

48. *Id.* at 688.

49. *Id.*

50. Different authors have disagreed on the actual date. See, SWEDISH INSTITUTE, *supra* note 6, at 1. Compare, J. FURLONG, *supra* note 4, at 92-3 with F. SCHMIDT, LAW AND INDUSTRIAL RELATIONS IN SWEDEN 14 (1977). Prior to 1970, however, "there was very little labor legislation" and the labor relations environment was governed by the Basic Agreement between the Swedish Employers' Confederation, *Svenska Arbetsgivareföreningen*, (SAF) and the Confederation of Swedish Trade Unions, *Landsorganisationen i Sverige*, (LO) and the few early decisions of the labor court. (The LO is not the only Swedish trade-union, but it is the union of the "manual laborers.") S. PEJOVICH, *supra* note 5, at 85. For the text to the Basic Agreement, see Basic Agreement (available upon request from the Swedish Consulate). As to the labor court, see Sigeman, *supra* note 14, at 132; cf. L. FORSEBACK, INDUSTRIAL RELATIONS AND EMPLOYMENT IN SWEDEN 39-40 (1980).

For a more specific but less directed analysis of current Swedish participation mechanisms, see Summers, *Worker Participation in Sweden and the United States: Some Comparisons from an American Perspective*, 133 U. PA. L. REV. 175 (1984).

dustrial" and "economic democracy."⁵¹ The Basic Agreement and the Agreement Regarding Works Councils⁵² provided Swedish workers with a voice in their work environment through collective bargaining agreements and worker-employer consultative bodies.⁵³ Nonetheless the unions felt that adequate information about,⁵⁴ and effective influence over, workplace decisions could be expected only by creating worker participation mechanisms in which unions could more fully participate⁵⁵ and in which real decision-making powers were vested.⁵⁶ In response, the Social Democratic government passed legislation between 1973 and 1977 setting out a new structure for Swedish collective labor law.⁵⁷

The *Medbestammande* mechanisms in Sweden consist of several pieces of legislation, the center⁵⁸ of which are the Act on the Joint Regu-

51. See, e.g., F. SCHMIDT, *supra* note 50, at 14; L. FORSEBACK, *supra* note 50, at 39-40.

52. See *infra* text accompanying notes 134-53 (in regard to German works councils); see also F. SCHMIDT, *supra* note 50, at 115 n.26 (on composition of Swedish works councils). For a brief comparison of Swedish and West German works councils, see *id.* at 80 n.2.

53. Works councils had "come into being" by 1946 in an agreement between the SAF and LO, F. SCHMIDT, *supra* note 50, at 79. The TCO (another Swedish labor organization) later joined in a revised agreement in the mid-1960's. *Id.*; L. FORSEBACK, *supra* note 50, at 38-9.

54. See, F. SCHMIDT, *supra* note 50, at 115.

55. See, *id.* at 79-80, 115-16. Cf. S. PEJOVICH, *supra* note 5, at 110-11 (discussing the increased union role under the new Act). For a more general discussion of such participation, see Fahlbeck, *supra* note 18, at 152-53 (discussing, generally, union representation of employees).

56. See, e.g., F. SCHMIDT, *supra* note 50, at 80-81.

57. E.g., Bills on worker representation on boards of Stock Companies, SFS 1976:351 and SFS 1972:829, see also L. FORSEBACK, *supra* note 50, at 52; Amendments to the Industrial Safety Act, SFS 1977:1160; the 1974 Act on the Position of the Trade Union Representative, SFS 1974:358, amended by SFS 1975:356, SFS 1976:594, see F. SCHMIDT, *supra* note 50, at 81-82; the 1974 Employment Protection Act, SFS 1974:12, see Sigeman, *supra* note 14, at 133; and the Act on the Joint Regulation of Working Life, SFS 1976:580, see Sigeman, *supra* note 14, at 133. See also P. AHLSTRÖM, CO-DETERMINATION AT WORK: THE ALMEX EXPERIENCE (Working Life in Sweden No. 17, March 1980).

58. J. FURLONG, *supra* note 4, at 93. Among the other pieces of legislation (not discussed herein for the purpose of brevity) in the codetermination area are: the Work Environment Act (dealing with occupational safety and health), SFS 1977:1160, amended by SFS 1980:245, ADA 1980:428, SFS 1982:674, see generally SWEDISH INSTITUTE, FACT SHEETS ON SWEDEN, OCCUPATIONAL SAFETY AND HEALTH IN SWEDEN (Jan. 1982); the 1974 Act on Litigation in Labor Disputes, SOU 1974:8, Bill 1974:77, see F. SCHMIDT, *supra* note 50, at 39; the 1974 Act on the Trade Union Representative's Position at the Workplace, SFS 1974:358, amended by SFS 1975:356, SFA 1976:594, SFS 1982:87, ILO LEGISLATIVE SERIES 1974-Sweden, 3, see Sigeman, *supra* note 14, at 133-42; and, perhaps, the most important of the *Medbestammande* legislation other than the Joint Regulation Act and the Act on Board Representation for Employees, the Anst. K. Kninyskyddslag, SFS 1982:80. This replaced SFS 1974:12, the statute referred to in the literature about Swedish labor law. It does not change the "for cause" requirement or the Employment Protection Act, which virtually abolished the employer right to dismiss employees at will. Fahlbeck, *supra* note 18, at 150. Cf. SWEDISH INSTITUTE, *supra* note 6, at 4 (an employee may only be discharged for cause).

lation of Working Life⁵⁹ (Joint Regulation Act) and the Act on Board Representation for Employees in Limited Companies and Co-operative Associations⁶⁰ (Board Representation Act). These two statutes are designed "to give workers a bigger voice in company decision-making."⁶¹

1. Board Representation Act

The representation of Swedish workers on the board of directors of Swedish corporations is, generally speaking,⁶² minority and primarily informational.⁶³ "The unions appear satisfied with the minority representation assigned to them under the law and look to the . . . co-determination act to provide significant gains in participation."⁶⁴ Therefore, the Board Representation Act is really viewed as a "complement"⁶⁵ to the Joint Regulation Act.

Generally, under the Board Representation Act the employees of a company employing twenty-five or more persons enjoy the right to appoint two members and two deputy members⁶⁶ to the board of directors of that company. This is the case even if the board consists only of two shareholder-nominated members. Where the company board consists of only one shareholder-nominated member, however, the employees are entitled to appoint only one wage-earner member and one deputy member. When the board is equally divided the chairperson has a deciding vote.⁶⁷ The statute assumes that the chairperson is appointed by the

59. SFS 1976:580 [hereinafter cited as Joint Regulation Act]. The English translation is reprinted in F. SCHMIDT, *LAW AND INDUSTRIAL RELATIONS IN SWEDEN* app. 1, at 234-246 (1977) [translation hereinafter cited as F. SCHMIDT Translation].

60. SFS 1976:351, *amended by* SFS 1980:236, SFS 1980:111 [hereinafter cited as Board Representation Act], which replaced a temporary measure of the same name, SFS 1972:829. The English translation is reprinted in 3 *LAW AND THE WEAKER PARTY: AN ANGLO-SWEDISH COMPARATIVE STUDY* 145-49 (1982) [hereinafter cited as *ANGLO-SWEDISH COMP. STUDY*].

61. J. FURLONG, *supra* note 4, at 93. *See also* F. SCHMIDT, *supra* note 50, at 85.

62. The exceptional situation where owners have one director and workers have one director does not disturb the owner majority since the statute assumes that the owner representative director, as chair, can break any tie vote. *See infra* notes 67-68 and accompanying text.

63. *See* section 1 of the Act itself: "The purpose of this Act is to afford to employees in joint stock companies and cooperative associations, by representation the board, *insight* and influence in respect of the activity of the enterprise." [emphasis added]. Board Representation Act § 1, *ANGLO-SWEDISH COMP. STUDY*, *supra* note 60, at 145. *Cf.* L. FORSEBACK, *supra* note 50, at 52 (discussing the Act); J. FURLONG, *supra* note 4, at 96-7 (discussing the aims of the Act).

64. J. FURLONG, *supra* note 4, at 96.

65. *Id.*

66. Board Representation Act § 5(1), *ANGLO-SWEDISH COMP. STUDY*, *supra* note 60, at 146.

67. S. PEJOVICH, *supra* note 5, at 108.

shareholders at the annual general meeting.⁶⁸

At least fifty percent of the employees of the company must be union members before the law becomes applicable.⁶⁹ The unions may either agree on the distribution of board seats among themselves or comply with a statutory allocation of seats. Normally, however, employee representatives are nominated by the largest labor confederation represented in the enterprise. Once the representatives have been appointed they may remain in office even if the number of employees falls below twenty-five, the statutory minimum to get initial board representation. As a general rule, employee representatives should be appointed from the employees of the concern.⁷⁰ After the decision to provide employees with representation on the board has been reached by the local trade union,⁷¹ the "board of the enterprise shall be informed in writing."⁷² The employee representatives, as well as the deputy members,⁷³ have the right to attend and speak at board meetings.⁷⁴ The regular worker representative member (as opposed to deputy members) has, in addition, all rights of a shareholder-nominated member subject to section 17 of the Act.⁷⁵ In addition, to prevent working or control committees from carrying on the actual business of the board without the benefit of worker participation, the Board Representation Act entitles at least one employee representative to sit on "specially appointed" board committees.⁷⁶

68. *Id.*

69. See Board Representation Act § 10(1), ANGLO-SWEDISH COMP. STUDY, *supra* note 60, at 147. This requirement not only is different than that of the Act on Joint Regulation, but is even different than the Act on the Union Representative's Position at the Workplace (which, like the Act of Board Representation of Employees discussed here, requires a union initiative to come into effect). *Id.* §§ 12.2-12.3 at 147.

70. See S. PEJOVICH, *supra* note 5, at 108; Board Representation Act § 6, ANGLO-SWEDISH COMP. STUDY, *supra* note 60, at 146.

71. The statute provides for such decisions to "be taken by a local trade union which is bound by a collective agreement in relation to the enterprise . . . or by several such trade unions . . ." *Id.* § 10(1) at 147.

72. *Id.* § 10(3) at 147. Recall, the local union must decide whether to bring the Act's provisions into operation. *Id.* § 10(1) at 147.

73. These usually are members of the minority union.

74. Board Representation Act § 15(1), ANGLO-SWEDISH COMP. STUDY, *supra* note 60, at 148.

75. "An employee member shall not be permitted to take part in the activity of the board . . . concerning

1. negotiations with trade unions;
2. . . . notice to terminate a collective agreement; or
3. industrial action." *Id.* § 17 at 148.

76. *Id.* § 16(1) at 148.

2. Joint Regulation Act

Perhaps the single most important piece of legislation in the *Medbestammande* area is the Joint Regulation Act.⁷⁷ As a consolidation of several earlier acts, "[t]his statute occupies a central position within Swedish labour law."⁷⁸ The Act applies to "the relationship between employer and employee,"⁷⁹ which in the Swedish context refers to the relationship between the employers' association and the trade union.⁸⁰ This means that, as a general rule, neither the employee nor, to a lesser degree, the employer is treated in its individual capacity. The phrase also indicates that the legislation covers both the public and the private sectors of the economy.

It is interesting to note that while the Joint Regulation Act is designed to give workers an equal voice in the making of decisions affecting their working life,⁸¹ its very first section reserves from its effect the relationship among the owners of the enterprise.⁸² This is especially interesting when one considers the fact that the 1975 Swedish Companies Act⁸³ "is based on the idea that *ownership* is the sole legitimation for decision making."⁸⁴ In keeping with this deference to ownership interests, the Act reserves some very crucial rights vested in the shareholders, and thereby excludes them from delegation to codetermination mechanisms by the board of directors.⁸⁵

77. SFS 1976:580, English translation reprinted in F. SCHMIDT, *supra* note 59, app. 1 at 234-46.

78. Sigeman, *supra* note 14, at 133. It is beyond the scope of this Note to discuss the full ramifications of this Act. For a brief, but full, discussion of how the Act fits into the overall scheme of Swedish labor law, see *id.* at 136-42. It is important to note at the outset that the conservative parties came into power after the passage of this Act and, during their term in office, there was no serious attempt to repeal the Act. See, *id.* at 132-33. One can at least assume this speaks to the degree of consensus surrounding the Act.

79. Joint Regulation Act § 1, F. SCHMIDT Translation, *supra* note 59, app. 1, at 234.

80. See F. SCHMIDT, *supra* note 50, at 91; Fahlbeck, *supra* note 18, at 152.

81. See *supra* text accompanying notes 16-17 & 53-57.

82. The purpose of the Act is to provide workers a role in decision-making. Notwithstanding such purpose, the reservation of corporate decision-making law from the scope of the Act appears to indicate the depth of the Act's concession to "managerial prerogative." Joint Regulation Act § 1, F. SCHMIDT Translation, *supra* note 59, app. 1 at 234.

83. SFS 1975:1385.

84. Fahlbeck, *supra* note 18, at 148 (emphasis in original).

85. The board can only delegate to the codetermination process those powers it enjoys itself. A situation where the owners would be asked to allow a delegation of rights reserved to shareholders has never arisen. Cf. *id.* at 148-49 (discussing "ownership integrity"). The rights reserved include the right to sell shares and "the right of liquidating the company." *Id.* There is one additional limitation of note. The Joint Regulation Act allows workers to participate in identifying the "aim and direction" of the enterprise, Joint Regulation Act § 2, F. SCHMIDT Translation, *supra* note 59, app. 1 at 234, except in certain identified circumstances, *id.* (the list

The Act consists of twelve distinct parts and has seventy sections.⁸⁶ "The most essential innovation in the . . . [Act] is the expansion of previously existing rights of negotiation. According to the Act, an employer is obligated to take the initiative in beginning negotiations with trade unions at the company before decisions are made on major issues."⁸⁷ Major issues are those involving "an important alteration" of an employer's activities.⁸⁸ This mandatory initiative is designed to replace unilateral decision-making by the employer with a bilateral decision-making process.⁸⁹ What this means is that the employer is obliged, subject to "very limited exceptions," to defer making or implementing a decision until negotiations required by the Act have taken place.⁹⁰

The Act neither explicitly sets out a time framework for negotiations nor identifies those topics which constitute "important alteration[s]" to the employer's activity or "important alteration[s] of work or employment conditions for employees."⁹¹ Despite this vagueness, the Act should be read to require "the employer to begin negotiations at a very early stage and to continue to negotiate throughout the decision making process."⁹² A recent labor court case has given some indications

includes religious, scientific, cooperative and political activities), and in regard to the "democratic process" in the public sector, *see generally*, L. FORSEBACK, *supra* note 50, at 48-9. "This is not intended to exclude discussions between management and employees about purposes—it is merely that the scheme of the Joint Regulation Act, with its obligatory negotiations etc., . . . is not to be available." F. SCHMIDT, *supra* note 50, at 94. This situation, where a topic is removed from the statutorily mandated scope of negotiation, is parallel to the "mandatory-permissive" dichotomy arising under the NLRA. *See supra* text accompanying notes 32-34.

86. Joint Regulation Act, F. SCHMIDT Translation, *supra* note 59, app. 1 at 234-46. §§ 1-6 are definitional; §§ 7-9 deal with the rights of employers and employees to associate; §§ 10-17 deal with the right of an organization of employees to negotiate with an employer; §§ 18-22 deal with a union's right to information; §§ 23-31 define collective agreement; § 32 deals with the right of the employees to joint regulation through collective agreement; §§ 33-37 deal with decision making in disputes over interpretation of agreements; §§ 38-40 deal with a limited union right of veto in protecting "public" rights; §§ 41-45 concern the peace obligation of the parties to an agreement; §§ 46-53 deal with negotiation rights and legal proceedings.

87. L. FORSEBACK, *supra* note 50, at 41. Section 11 states:

Before an employer decides on important alteration to his activity, he shall, on his own initiative, negotiate with an organisation of employees in relation to which he is bound by collective agreement. The same shall be observed before an employer decides on important alteration of work or employment conditions for employees who belong to the organisation.

If urgent reasons so necessitate, the employer may make and implement a decision before . . . [fulfilling] his duty to negotiate. . . .

Joint Regulation Act § 11, F. SCHMIDT Translation, *supra* note 59, app. 1 at 235-36.

88. Joint Regulation Act § 11, F. SCHMIDT Translation, *supra* note 59, app. 1 at 235-36.

89. Fahlbeck, *supra* note 18, at 153.

90. *Id.* at 153.

91. Joint Regulation Act § 11, F. SCHMIDT Translation, *supra* note 59, app. 1 at 235-36.

92. Fahlbeck, *supra* note 18, at 155 (discussing commentary in the Bill to the Act). It is

of the topics to be covered by the Act.⁹³ In addition, the legislature has indicated that it feels that the scope of such negotiations includes "all matters . . . of a range and meaning to employees about which one would generally assume the union wished to negotiate."⁹⁴ Thus, in addition to the duty to initiate negotiation, the Act also requires that the employer and employee organizations negotiate with regard to any additional decisions which concern an employee-union member if the employee organization should so request.⁹⁵

What is most striking about this duty, however, is that at the end of the process, *i.e.*, once negotiations are over, the employer, unless there is an agreement of the parties to the contrary, retains the ultimate right to make the decision. The Act seeks to establish a bilateral process and allows the union to demand codetermination rights in collective agreements but limits industrial actions to coerce such rights to the time after a collective bargaining agreement has expired unless the topic has been freed from the peace obligation in the negotiation process.⁹⁶

The Act combines the duty to negotiate with rules on the right to obtain information. The employer is required

to keep the local trade union organization informed on how operations are progressing, economically and in terms of production. He is also obligated to . . . [inform the union] about the guidelines of company personnel policy . . . [and] to take various steps to make it easier for employees to obtain information concerning the situation of the

important to mention the fact that negotiations, if unsuccessful at the local level, will be more or less routinely referred for central negotiation. Since this is a time consuming process, it is particularly significant that the negotiations be started at an early stage. *Cf.* Joint Regulation Act § 14(1), F. SCHMIDT Translation, *supra* note 59, app. 1 at 236 (relating to reference for centralized negotiations).

93. AD 1979:188.

94. Commentary, Bill to the Act for the 1976 Joint Regulation Act at 353, *quoted in* Fahlbeck, *supra* note 18, at 154. It may be helpful in understanding the exact scope of the statutory duty to examine which topics are not included. The duty does not encompass "decisions and measures of the employer which recur from time to time in substantially the same way, and are thus dealt with in accordance with an established routine." Bill 105, app. 1, at 353, *quoted in* F. SCHMIDT, *supra* note 50, at 108. "Nor does the duty . . . arise in the case of replacement of worn out items, where business goes on as before [footnote omitted]." *Id.*

For an interesting list of included topics (including facilities closure/relocation) see L. FORSEBACK, *supra* note 50, at 41.

95. Joint Regulation Act § 12, F. SCHMIDT Translation, *supra* note 59, app. 1 at 236. Since the scope of section 11 is already so broad, it is quite possible that it may yet swallow the additional topics which would arise under section 12. *Compare id.* § 11, app. 1 at 235-36, *with id.* § 12, app. 1 at 236.

96. *See id.* §§ 41-45, app. 1 at 241-42.

company.⁹⁷

This requirement is especially important in light of the aims of the Act to create a bilateral decision-making process in which the union is an equal partner and to afford the union a more equal opportunity for insight into the enterprise.

Another mechanism for achieving joint regulation is the "priority of interpretation."⁹⁸ Prior to the Act, if a dispute arose as to the meaning of a collective agreement, until the dispute was legally resolved the employer could require that its interpretation be implemented. This power was assumed to flow from the owner's prerogative to direct the enterprise. What this practically meant was that "the employee was directed to obey first and challenge later."⁹⁹ Under the Act,¹⁰⁰ the priority of interpretation lies with the employer regarding legal disputes over pay.¹⁰¹ A priority lies with the union in three circumstances.¹⁰² The importance of this priority lies in the fact that the priority of interpretation is an *interim* power to decide. The final decision-making power rests with the parties to the contract themselves, or, where they fail to agree, with arbi-

97. L. FORSEBACK, *supra* note 50, at 41-2. See Joint Regulation Act §§ 18-22, F. SCHMIDT Translation, *supra* note 59, app. 1 at 236-37.

98. Where a collective agreement contains provisions about a right of joint regulation for employees in a matter which is referred to in section 32 and, in a particular case, a dispute arises over application of any such provision or of a decision which has been made by virtue thereof, the employee party's view [of the interpretation of the agreement] shall apply until that dispute has been finally tried. The same shall apply in a dispute over provisions in a collective agreement concerning [disciplinary] measures for an employee who has committed a breach of contract.

Joint Regulation Act § 33, F. SCHMIDT Translation, *supra* note 59, app. 1 at 239 (bracketed material added by translator). For the entire section of the statute dealing with this issue, see *id.* §§ 33-40, app. 1 at 239-41.

99. Fahlbeck, *supra* note 18, at 159. This rule was built on labor court judgment 1934:179 and an earlier labor court decision, 1929:29 ("[T]he employee, under the collective agreement, had a duty to perform all such work for the benefit of the employer . . . so long as the work fell within the worker's general competence."). Labor Court Decision 1929:29, quoted in F. SCHMIDT, *supra* note 50, at 79.

100. Employee organizations may have priority of interpretation under other substantive legislation as well. See, e.g., 1974 Act on the Position of the Union Representative in the Workplace, SFS 1974:358; amended by SFS 1975:356, SFS 1976:514, SFS 1982:87.

101. Joint Regulation Act § 35, F. SCHMIDT Translation, *supra* note 59, app. 1 at 239.

102. The priority of interpretation rests with the established union:

- (1) in disputes over a collective agreement on joint regulation or a decision made under such an agreement;
- (2) in disputes over "provisions in a collective agreement concerning (disciplinary) measures for an employee" (§ 33) and, most importantly,
- (3) in disputes over a member's contractual duty to perform work (§ 34) [sic].

Fahlbeck, *supra* note 18, at 161. Although beyond the scope of this Note, notice the limited union veto provided for in Joint Regulation Act §§ 38-40, F. SCHMIDT Translation, *supra* note 59, app. 1 at 240-41. See generally *id.* at 112-14.

trators or the labor court.¹⁰³ Despite its *interim* effect, the primary importance of the power is as "a means to exert pressure on the employer in order to induce him to come to amicable solutions for differences over interpretation."¹⁰⁴

The core of the Joint Regulation Act is the collective agreement.¹⁰⁵ This is made explicit by section 32 of the Act which says:

Between parties who conclude a collective agreement on wages and general conditions of employment there should, if the employer party so requests, also be concluded a collective agreement on a right of joint regulation for the employees in matters which concern the conclusion and termination of contracts of employment, the management and distribution of the work, and the activities of the business in other respects.

In collective agreements on joint regulation the parties, observing § 3 of this Act, are free to decide what decisions which would otherwise have been taken by the employer shall instead be taken by representatives of the employees or by a body composed of representatives of both parties.¹⁰⁶

Therefore, although the Act does not detail what such an agreement might look like, it is clear that a division of decision-making powers among employer, employee and joint regulation bodies with representatives of each is what the legislature envisioned.¹⁰⁷ In order to achieve such agreements, a demand by the employee side to include a matter in a joint regulation agreement will have the effect of freeing that matter from the peace obligation that would otherwise apply.¹⁰⁸ In the final analysis, therefore, the implications of the Act for the role of the worker in the determination of workplace decisions depends on the demands of his or her union at the bargaining table and *its* ability to back up these demands with industrial action.

103. Fahlbeck, *supra* note 18, at 160.

104. *Id.* at 161.

105. See F. SCHMIDT, *supra* note 50, at 81.

106. Joint Regulation Act § 32, F. SCHMIDT Translation, *supra* note 59, app. 1 at 239. The second paragraph was added by 1977 amendment and is set out at Fahlbeck, *supra* note 18, at 166 n.24. For an interesting side note about the role of the number 32 in Swedish labor law and for a good discussion of how the use of that number symbolized a turning of ideological tables, see J. FURLONG, *supra* note 4, at 93-4.

107. That this is the ultimate goal of the process is made explicit by amendments to the Act passed in 1977. See *supra* text accompanying note 106, para. 2. See also section 33(1), which was amended at the same time to state that: "The provisions herein shall not, however, give the employee party any power to implement a decision on the employer's behalf." Fahlbeck, *supra* note 18, at 166 n.24.

108. F. SCHMIDT, *supra* note 50, at 81.

B. Swedish Conceptions of Industrial Democracy

The Social Democratic Party and its ideology have had, and continue to have, a great deal to do with the concepts of "industrial" and "economic" democracy that are at the heart of *Medbestämmande* legislation.¹⁰⁹ While any detailed exploration of these concepts and their ideological roots is beyond the scope of this Note, the basic ideas at their core are: (1) that the distribution of power in the workplace, as symbolized by section 32 of the SAF (employers' association) Constitution,¹¹⁰ and the prerogatives for management which such distribution entails are contrary to the idea of democracy and (2) that democracy in the political sphere requires a parallel in the industrial sphere.¹¹¹ In a democratic society, "the notion that the right for employers unilaterally to direct and distribute work is outmoded, and should be replaced"¹¹²

There are four factors underlying the *Medbestämmande* legislative scheme adopted by the Social Democrats and embodied in the statutes discussed here.¹¹³ First, the statutory rules are designed to be "basically a legislative framework" and are "based on evolution . . . and on gradual change rather than a sudden *volte face*."¹¹⁴ The legislation provides an arena in which the parties are to thrash out the ultimate results. It provides only a process, not a solution. Second, joint regulation "is based on an indirect form of democracy, where employees are represented by established trade unions"¹¹⁵ and where the measure of democ-

109. See generally H. TINGSTEN, *THE SWEDISH SOCIAL DEMOCRATS, THEIR IDEOLOGICAL DEVELOPMENT* (1973). One of the best political overviews in this area is provided by W. KORPI, *THE WORKING CLASS IN WELFARE CAPITALISM, WORK UNIONS AND POLITICS IN SWEDEN* (1978).

The more "macroeconomic" elements of "economic democracy" as contrasted to the more modest "industrial" democracy and recent attempts to statutorily achieve such aims are not dealt with here. See generally R. MEIDNER, *EMPLOYEE INVESTMENT FUNDS AND CAPITAL FORMATION: A TOPICAL ISSUE IN SWEDISH POLITICS* (Working Life in Sweden No. 6, June 1978); J. FURLONG, *supra* note 4, at 97; Fahlbeck, *supra* note 18, at 149.

110. ". . . [T]he employer is entitled to direct and distribute the work, to hire and dismiss workers at will, and to employ workers whether they are organized or not." Section 23 of the "December Compromise" (which later became section 32 of the SAF Constitution), *quoted in* F. SCHMIDT, *supra* note 50, at 64.

111. Cf. S. PEJOVICH, *supra* note 5, at 93 (discussing some of the roots of industrial democracy in Sweden).

112. Fahlbeck, *supra* note 18, at 150.

113. The structure and general framework as well as some of the specific language of this discussion comes from the analysis by R. Fahlbeck. Fahlbeck, *supra* note 18, at 149-52. The ideas are further informed by F. SCHMIDT, *supra* note 50, *passim*, and lectures on Social Democracy by Douglas Kellner, Asst. Prof. of Philosophy, Univ. of Texas, in a class in Marxist philosophy at the University in Fall 1981.

114. Fahlbeck, *supra* note 18, at 151.

115. *Id.*

racy is the workers' input into the process and not the individual worker's situation.¹¹⁶ The first of these ideas is predicated on the concept that both employers and employees contribute to and take risks for the enterprise and that "decision making is to be shared by the contributors of capital and the contributors of labour in a common decisionmaking process where employees participate through their trade unions."¹¹⁷ The second denies the individual worker standing in the process in an effort to "collectivize" employee interests within the legislative arena. It holds, in short, that since the employee is represented in the process, the process is democratic.¹¹⁸

The third factor is that these statutes do not interfere with the primary goal of the free enterprise system: profits. Commentary in the bill to the Act emphasizes the need for efficiency in the workplace as a means of fortifying the basic economic aim of making profits. Under this theory, greater efficiency can be achieved through joint regulation.¹¹⁹ The final element is that information and participation are viewed as likely to reduce employee alienation and increase employee satisfaction and productivity.¹²⁰ The *Medbestammande* legislation established collective bargaining as the means through which to determine the goals of workplace democracy and the forum in which such a determination is to be made.¹²¹

C. The Degree of Bifurcation of Worker Organizations (Workers' Unions v. Workers Organized *qua* Workers)

As has been noted earlier,¹²² the *Medbestammande* legislation in Sweden to a large extent does not provide individual employees with rights.¹²³ "[I]t must *always be a trade union* which acts *on the employee side*. The employer—however small the enterprise may be—may act

116. *Id.* at 151-52.

117. *Id.* at 151.

118. *Id.* at 151-52, 156.

119. *Id.* at 151. *Cf. id.* at 156 (on the conflict of the ideological and the practical aspects of joint regulation).

120. *Id.* at 151 and 156; S. PEJOVICH, *supra* note 5, at 7. See generally A. Sandberg, *From Satisfaction to Democratization: On Sociology and Working Life Changes In Sweden* (Working Papers 1980) (discussing these issues from a sociological perspective).

121. *Cf.* S. PEJOVICH, *supra* note 5, at 4 ("Proponents of codetermination have been emphasizing the psychological and sociological effects of labor participation on workers (participatory democracy, humanization of labor) rather than its potential of raising total labor compensation.").

122. See *supra* text accompanying notes 79-80 and 115-16.

123. Indeed, "[i]ndividual employees are subject to no less authority than before." Fahlbeck, *supra* note 18, at 152 [footnote omitted].

alone, but the interests of the employee side must always be taken care of by a trade union."¹²⁴

The only prominent exception to this generalization is the works council,¹²⁵ where employees *qua* employees, not as members of a trade union, are represented. This is the one body with potential codetermination powers which preexisted the 1976 Joint Regulation Act and even the 1973 predecessor legislation to the Board Representation Act.¹²⁶ Despite their longevity and theoretical potential as worker participation mechanisms, the Swedish works councils are under attack with critics asking not how to make them more effective, but whether it is necessary to give them any real power at all.¹²⁷ Even here, however, the employees are represented as a whole. It seems that even if employee interests are not always treated as trade union interests, the best generalization about Swedish labor law and its relationship to workers is that the law "collectivizes" employee interests before it affords them protection.

Most modern Swedish statutes "expressly permit the employer to apply collective agreements both to members of the signatory union and to other employees within the scope of the agreement."¹²⁸ Since "joint regulation in most cases affects union members as well as non-members, [t]his means that Swedish labour law has to a large extent *de facto* adopted the American majority rule, a notion which was formerly strongly repudiated by the Swedish legislature."¹²⁹ Because the union effectively speaks for all the workers in the enterprise and not merely its membership, the effect of this *de facto* change may very well be to lessen

124. F. SCHMIDT, *supra* note 50, at 91.

125. Works councils vary from country to country in composition, function and structure. What they have in common, however, is that they are plant specific bodies on which at least some representatives of the plant employees are entitled to participate. Their purpose is to provide information to workers, and, depending on the country, to afford some degree of worker input. See also *supra* text accompanying note 22.

126. Works councils under the Swedish scheme of codetermination are primarily informational and serve as conduits of employee-employer consultation. For a brief overview, see L. FORSEBACK, *supra* note 50, at 38-39.

127. F. SCHMIDT, *supra* note 50, at 79. The general hostility of trade unions to works councils arises from their strength in Germany. Swedish unions perceive that a loss in membership in German unions is the result of stronger works councils there. *Id.* at 80. An additional handicap is that Swedish works councils have employee and employer representatives.

128. Fahlbeck, *supra* note 18, at 152. For an insightful analysis of the worker representative function of Swedish unions and the role Swedish labor law assigns to worker representative organizations, see Summers, *Comparisons in Labor Law: Sweden and the United States*, 7 INDUS. REL. L.J. 1 (1985).

129. *Id.* By applying the agreement to members and nonmembers alike, the union becomes, in some ways, the exclusive representative of the employees.

the tendency to treat workers *qua* workers and workers as trade union members differently.

V. A REVIEW OF WORKER PARTICIPATION MECHANISMS IN THE FEDERAL REPUBLIC OF GERMANY

A. Mechanisms

There are three chief methods of advancing worker participation in the Federal Republic of Germany. These are: collective agreements, work level codetermination through works councils and supervisory board level codetermination.

1. Collective Agreements

Collective agreements are industry-wide and negotiated by centralized workers' unions and employers' associations.¹³⁰ As a result of practical limitations imposed by the large number of employers and workers covered by such agreements, and of the history of the labor movement and workers committees in Germany, "the collective agreement has been rather narrowly limited to wages, hours and closely related subjects which can be regulated by the general rules of industry agreements."¹³¹ The influence of the union and the collective agreement, however, has been somewhat strengthened by the Works Council Act of 1972.¹³²

130. This highly centralized structure removes much of the strife of labor-management confrontation in the collective bargaining process from the experience of the average worker. See Summers, *supra* note 21, at 371-73.

131. See *id.* at 380.

[T]he unions were willing to accept factory councils only on the condition that the councils not encroach on the functions of unions or act in conflict with the unions' collective agreements. The result . . . [was] legally established works councils at the plant level with a limited role in plant decisions and substantial independence of the employer. [These] . . . were constitutional organs of the plant, not branches of the trade unions. [footnote omitted] . . . [N]egotiation of wages, hours and other economic terms was left to the trade unions. The unions were willing to accept this statutory plant organization only because they lacked effective organization of their own at the plant level. The Works Council Act [of 1920] provided an immediate structure of worker representation which the unions were not ready to provide.

Id. at 375. After the Second World War, "[e]lected works councils were reestablished as part of the shop constitution, separate from the trade unions The Works Council Act of 1952 solidified this divided system of representation, and the Works Council Act of 1972 continued it." *Id.* See J. FURLONG, *supra* note 4, at 6.

132. Betriebsverfassungsgesetz [BetrVG] Art. 77, (W. Ger.) Bundesgesetzblatt [BGB1] I 13, translated in COMMERCE CLEARING HOUSE, GERMAN WORKS COUNCIL ACT OF 1972 (H. Beinhauer trans. 1972) [hereinafter cited as WORKS COUNCIL ACT]. This section removes from management-works council negotiations those matters covered by the collective bargain-

2. Works Councils

The 1972 Works Council Act grants the works councils rights which pertain to hiring, firing, transfers, mergers and other structural changes, social matters, the working place, operational planning, personnel planning and vocational training.¹³³ Any enterprise with five or more employees (aged eighteen years or older) is required to have a works council, although enterprises with less than twenty-one employees need have only one representative on the council.¹³⁴ The Act grants the works council a genuine voice in decisions about hiring, firing, transfers and changes in classification. It is no longer enough for the employer to inform the works council of its decisions in these areas. The employer must get the works council's consent and the works council may refuse to give that consent for a number of reasons specified in the Act.¹³⁵ If the works council refuses to consent, the employer may ask the labor court to intervene and give its consent instead.¹³⁶ If the employer goes to the labor court, he or she cannot take the disputed action in the interim unless "urgently required."¹³⁷ The works council has an even greater role if the employer's action involves a firing.¹³⁸

In addition to the relatively individual-oriented personnel matters discussed above, the works council is also intimately involved in broader enterprise decisions. Under section 111 of the Act,¹³⁹ management and the works council must agree on structural changes such as "reduction

ing agreement, affording unions greater exclusivity as bargaining partners in collective negotiations.

133. *Id.* at 2 (translator's introduction). These rights are chiefly secured by the following sections of the Act: hiring: §§ 95, 99, 105; dismissal: §§ 95, 99, 102, 103, 123; transfers: §§ 95, 99; mergers: § 111; working place: §§ 82, 90, 91, 95, 116; structural changes: §§ 111, 123; personnel planning: §§ 92-95, 99, 100; vocational training §§ 6, 38, 70, 82, 92; social matters: § 87; operational planning §§ 90, 91.

134. *Id.* § 9 at 27-8. The structure of works councils, particularly with regard to the division into economic committee and works assembly, *id.* §§ 42-46 at 46-9 and *id.* §§ 106-10 at 84-8, is a topic beyond the scope of this Note; the constitution and relative functions of these entities are easily enough ascertained from the statute itself. *Cf.* SEGFARTH, SHAW, FAIRWEATHER & GERALDEN, *LABOR RELATIONS AND THE LAW IN WEST GERMANY AND THE UNITED STATES 104-05 (1977)* [hereinafter cited as SEGFARTH] on economic committees.

135. WORKS COUNCIL ACT, *supra* note 132, at 2-3 (translator's introduction). *See also id.* §§ 99-100 at 79-81. Note that one of the reasons for refusing consent could be that the proposed alteration is contrary to guidelines or even imposed on the enterprise by either an employer-works council decision under § 93 or by a conciliation board ruling against management's wishes. *See id.* § 93 at 76, § 95 at 76-77 (on the conciliation board and personnel guidelines).

136. *Id.* §§ 99-100 at 79-81.

137. *Id.* *See also id.* at 3 (translators introduction).

138. *See id.* § 95 at 76-77, § 123 at 105-107, § 99 at 79-80, § 102 at 81-83, § 103 at 83-84.

139. *See id.* § 111 at 88.

or shutdown of production, mergers, relocation of the entire enterprise or part of it, basic changes in the enterprise's organization or purpose and introduction of fundamentally new working and production methods."¹⁴⁰ Under section 123, takeovers also fall into this category.¹⁴¹ If the parties fail to agree on such a decision, the Act requires mediation by a conciliation board consisting of labor and management representatives and a "neutral" chair¹⁴²—but it is the parties who must ultimately agree.

Where working periods or methods of pay tied to efficiency (e.g. piece work) are not fixed by statute or collective agreement, section 87 of the Works Council Act vests the works council with codetermination rights as to changes in these areas as well.¹⁴³ In addition, other sections require employers to provide the works council both with information about changes within working places, in job surroundings or in other operational and working conditions plans, and with reasonable time to demand measures to alleviate or compensate for potential problems.¹⁴⁴ Works councils must also be consulted on matters of vocational training¹⁴⁵ and personnel guidelines, planning and forms.¹⁴⁶

While the Act spells out several other changes in West German labor law including provisions safeguarding individual rights of the employee¹⁴⁷ and expanding the union's right to a presence in the workplace,¹⁴⁸ the most important change embodied in the Act is the expansion of the scope and function of the conciliation board.¹⁴⁹ Prior to the Act, the function of the board was to mediate.¹⁵⁰ Today, under the Act, the mediation function continues,¹⁵¹ but the board itself can now

140. *Id.* at 4 (translator's introduction). If, however, the situation is one dealing with "effects" of a decision rather than the decision itself, the parties must agree in face of losing their input. If they fail to agree, a decision will be made *for* them by a conciliation board. *Id.*

141. *Id.* § 123 at 105-107.

142. *Id.* § 124 at 108-110.

143. *Id.* § 87 at 72-73.

144. *Id.* §§ 90-91 at 74-75.

145. *Id.* §§ 96-98 at 77-79.

146. *Id.* §§ 92-95 at 75-76. In enterprises with more than 1000 employees, works councils must be given special input into personnel guidelines. *See id.* at 7 (translator's introduction).

147. *Id.* §§ 81-5 at 69-71. This is unique among German labor statutes.

148. *See, e.g., id.* § 2 at 23; § 31 at 40 & § 43 at 47-8. *See also id.* § 74 at 63-4 (on union activities of works council members).

149. A conciliation board consists of an equal number of works council and management representatives plus a "neutral" chair, selected by the parties jointly or, if they fail to agree, by the labor court, with a tie-breaking (called "casting") vote. *Id.* § 76 at 64-6.

150. *See* SEGFARTH, *supra* note 134, at 113-14.

151. *See, e.g.,* WORKS COUNCIL ACT, *supra* note 132, § 95 at 76-7 (on changes in guidelines for classification, transfers and hiring); *id.* § 94 at 76 (on, *inter alia*, job application forms); *id.* § 91 at 75 (on, *inter alia*, workplace or job surroundings changes). However, not all

decide certain issues if the parties fail to come to an agreement.¹⁵²

3. Supervisory Board Level Participation

Under the provisions of three different statutes, workers are represented on the supervisory boards (*Aufsichtsrat*)¹⁵³ of enterprises in the *Montan* sector of the economy,¹⁵⁴ in all joint-stock companies,¹⁵⁵ all limited liability companies (*GmbH*) and in profit-oriented and trading cooperatives employing more than fifty employees.¹⁵⁶ Each statute, and consequently each statutorily created group of enterprises, has its own degree of worker representation on the board ranging from the so-called "stringent parity"¹⁵⁷ of labor and shareholders in the *Montan* sector to the one-third worker participation in the smaller enterprises.¹⁵⁸

Outside the *Montan* sector, which is governed by a statute expressly dealing with that sector of the economy,¹⁵⁹ and which is not discussed in

situations give both (as opposed to only one) of the two parties access to the board. Therefore, a party must be careful to consult the statute.

152. Despite these relatively limited situations where management can lose, under the statute, its prerogative to refer such matters to a conciliation board (on which it does *not* have a majority) if it fails to come to an agreement with the works council, management generally retains the right to refuse to agree with a works council and to make that decision "stick" because of the limited scope of the issues the board can actually decide.

153. In German joint stock companies, "[i]mmediate control of the company is split between the supervising board (*Aufsichtsrat*) and the management board (*Vorstand*)." J. FURLONG, *supra* note 4, at 7. The supervisory board "sometimes is compared to the board of directors of American companies, while the management board is likened to the American management committee. The German system . . . , however, doesn't allow anyone to belong to both bodies." *Id.* While the "size of the role to be given the supervisory board in corporate affairs differs from company to company," it has two main duties: "to appoint (and, if necessary, fire) members of the management board, and to oversee the management board's work." *Id.* Cf. M. PELTZER, CO-DETERMINATION ACT 1976, MITBESTIMMUNGSGESETZ 1976 (2d ed. 1980), at 5 (describing the German two-tier board system).

154. *Montan* is the term used to describe the coal, iron and steel industries. J. FURLONG, *supra* note 4, at 4.

155. *But see* M. PELTZER, *supra* note 153, at 207-8. "If the company employs no employees or—this is disputed—less than 5, no labor participation is necessary."

156. Betriebsverfassungsgesetz [BetrVG] Art 76-7, 1952 BGBI I at 681 [hereinafter cited as Enterprise Organization Act]. *See also* M. PELTZER, *supra* note 153, at 7. It is significant that there is no mandatory representative for workers if the form of the enterprise is a general partnership, even if all of the partners are corporations. *Id.* at 8.

157. M. PELTZER, *supra* note 153, at 1.

158. Enterprise Organization Act, *supra* note 156, §§ 76-77.

159. For a brief but relatively complete discussion of the coverage of the *Montan* Act, see Mitbestimmungsgesetz 1951, Bundesgesetzblatt [BGBI] I at 347; *see also* S. PEJOVICH, *supra* note 5, at 68-70. It is sufficient for the purposes of this discussion to say that, in *Montan* enterprises, the shareholders meeting elects the owners' representatives and confirms the workers' representatives (some of whom are nominated by the works council subject to union veto and some of whom are nominated by the union) such that representatives of each are equal in number (e.g., if the workers have five representatives, so do the shareholders) and one repre-

this Note, the degree of worker representation on the supervisory board depends on whether the enterprise falls within the terms of one of two key statutes: the Enterprise Organization Act of 1952¹⁶⁰ or the Codetermination Act of 1976.¹⁶¹ If the enterprise is organized as a joint-stock company, or if it has more than 500 employees and is organized as a *Gewerksschaft*, a profit-oriented cooperative, a limited liability company or a certain kind of partnership,¹⁶² it is covered by one of these two Acts.¹⁶³ If it falls within one of these groups and employs more than 2000 workers, it is covered by the Codetermination Act of 1976.¹⁶⁴ If its form and structure fits within one of these groups but it employs 2000 workers or less, it is covered by the Enterprise Organization Act.

Before the enactment of the Codetermination Act of 1976, which sets apart larger enterprises outside the *Montan* for special treatment, the Enterprise Organization Act provided the general legislative framework within which workers and management engaged in managerial codetermination.¹⁶⁵ The 1952 Act was amended in 1972 and now provides for one-third of the members of the supervisory board of an affected enterprise to be elected by the firm's employees.¹⁶⁶ The shareholders'

sentative of each group (the employees and the owners) is "external." The council itself elects, by majority vote, a "neutral" member to prevent stagnation due to tie votes and to represent the "public interest." *Id.*

160. Enterprise Organization Act, *supra* note 156, at 681.

161. Gesetz über die Mitbestimmung der Arbeitnehmer, 1976 [BGBI] I at 1153. Two translations are interchangeably used here in order to help clarify statutory translation: J. FURLONG, *supra* note 4, app. 137-163 and M. PELTZER *supra* note 153, at 35. [Hereinafter cited as Codetermination Act of 1976]. In order to accurately understand the scope of the Act, one must realize that Article I, § 1(4) of the 1976 Act provided in part, that the Act "does not apply to enterprises which directly and predominantly serve 1. political, religious, charitable, educational, scientific or artistic purposes, or 2. the purposes of reporting or free expression of opinion. . . ." Codetermination Act of 1976, art. I, § 1(4), J. FURLONG, *supra* note 4, app. at 138. This exception applies to the Enterprise Organization Act as well. Enterprise Organization Act, *supra* note 156.

162. Discussions of partnerships covered by these statutes tend to be very complex. For a relatively simple, albeit incomplete, discussion see M. PELTZER, *supra* note 153, at 10.

163. See Enterprise Organization Act, *supra* note 156, §§ 76-7; Codetermination Act of 1976, art. I § 1(1), J. FURLONG, *supra* note 161, app. at 137. Certain enterprises are, therefore, excluded from the general worker participation scheme because of their organization or size.

164. The concept of a "jobholder" is defined in Codetermination Act of 1976, art. II, J. FURLONG, *supra* note 4, app. at 138. Coverage of the 1976 Act is discussed in Art. I §§ 1(1)-(2), *id.* at 137. Estimates suggest that around 650 companies fall under the new law. M. PELTZER, *supra* note 153, at 4-5.

165. S. PEJOVICH, *supra* note 5, at 71. The 1952 Act actually spelled out all levels of codetermination, other than the collective bargaining agreement, which were in effect at the time. *Id.* The relevant, or, perhaps, remaining provisions of the Act, however, deal with worker representation on the *Aufsichtsrat*. *Id.* at 71-72. "[A]bout a million jobholders continue to be affected by this arrangement." J. FURLONG, *supra* note 4, at 22.

166. WORKS COUNCIL ACT, *supra* note 132, at 13 (translator's introduction); Enterprise

representatives therefore hold two-thirds of the seats and the workers' representatives hold one-third. The size of the board is not fixed by the 1952 Act itself, but the 1965 Joint Stock Company law sets a minimum board size of three.¹⁶⁷ On supervisory boards with one or two labor representatives, each must be an employee of the enterprise.¹⁶⁸ In the case where there are two labor representatives, one must be a blue-collar and one a white-collar employee.¹⁶⁹ The additional worker seats, if there are more than two, may be occupied by union representatives but "have tended to go to company jobholders."¹⁷⁰ The worker representatives are selected in direct general elections.¹⁷¹ Significantly, this "[o]ne-third representation generally [has] limited workers to a consultative, rather than co-determining, role"¹⁷²

The most recent, and controversial,¹⁷³ board level representation legislation, the Codetermination Act of 1976, gives workers and shareholders an equal number of seats on supervisory boards of companies to which the Act applies.¹⁷⁴ The formation, composition and principles of appointment for the members of the supervisory board are detailed in the Act.¹⁷⁵ Of particular interest is the fact that two or three of the worker representatives on the board are "trade-union representatives"¹⁷⁶ and

Organization Act, *supra* note 156, §§ 76-7. See M. PELTZER, *supra* note 153, at 7-8; see also S. PEJOVICH, *supra* note 5, at 72 (illustration).

167. J. FURLONG, *supra* note 4, at 22.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* Note that, unlike under the 1976 Act, there is no union representation. See, e.g., Codetermination Act of 1976, art. XVI, J. FURLONG, *supra* note 4, app. at 149.

172. J. FURLONG, *supra* note 4, at 22. This is why there was such pressure for the 1976 Act giving workers more of a presence on the *Aufsichtsrat*.

173. See, e.g., *id.* at 26-7; Meissel & Fogel, *supra* note 6, at 182. With parity also comes a mechanism by which the shareholders' side of the board can prevail in case of a tie.

174. Codetermination Act of 1976, J. FURLONG, *supra* note 4, app. at 141-42. According to art. 7, "[t]he supervisory board of the enterprise with, as a rule,

1. Not more than 10,000 jobholders, is composed of six representatives each of the shareholders and jobholders;
2. more than 10,000 but no more than 20,000 jobholders, is composed of eight representatives each of the shareholders and the jobholders;
3. more than 20,000 jobholders, is composed of ten representatives each of shareholders and jobholders."

Id. at § 7(2), app. at 141. Enterprises may elect to have a bigger, but not a smaller, board. *Id.*

175. *Id.* at §§ 6-9, app. at 140-43.

176. The jobholder supervisory board members must include:

1. in a supervisory board with six jobholder members: four jobholders of the enterprise and two trade union representatives;
2. in a supervisory board with eight jobholder members: six jobholders of the enterprise and two trade-union members:

that the employee representatives who come from the enterprise "must reflect the ratio of wage-earning and salaried employees in the company."¹⁷⁷ The shareholders' representatives are selected "by the organ empowered by law, bylaws, articles of partnership or statute to elect members of the supervisory board."¹⁷⁸ If the enterprise employs no more than 8000 people, the employee representatives are normally selected through "direct election"¹⁷⁹ and if it employs more than 8000, selection is generally through electors.¹⁸⁰ The employees are, however, entitled to opt for the alternative method of selection (*i.e.* direct election instead of through electors or through electors instead of by direct election).¹⁸¹

Article 27 of the Act sets out the procedure for the election of the chair of the supervisory board.¹⁸² Since the usual procedure requires a two-thirds majority of the board,¹⁸³ the labor and owner representatives have to agree on the chair. It is possible, however, for the shareholders' representatives to have the final say in the matter if the parties cannot agree.¹⁸⁴

The apparent parity of employee representation under the Codetermination Act is not total. In order to help the proposal withstand constitutional challenge,¹⁸⁵ Article 29 was added to the Act.¹⁸⁶ It

3. in a supervisory board with ten jobholder members: seven jobholders of the enterprise and three trade union representatives.

Id. at art. VII §§ 2(1)-(3), app. at 141-42.

177. M. PELTZER, *supra* note 153, at 17. See Codetermination Act of 1976, art XV § 2, J. FURLONG, *supra* note 4, app. at 147. Salaried employees "must reflect the ratio of employees with (*cp.* § 5 subsection 3) and without (*cp.* § 6 subsection 2 LMRA) managerial responsibility." M. PELTZER, *supra* note 153, at 7.

178. Codetermination Act of 1976, art. VIII § 1, J. FURLONG, *supra* note 4, app. at 142.

179. *Id.* at art. IX § 2, app. at 143.

180. *Id.* at art. IX § 1, app. at 142.

181. *Id.* at art. IX §§ 1-3, app. at 142-43.

182. This provides in part: "Chairmanship in the Supervisory Board:

(1) The Supervisory board elects from its midst, with a majority of *two thirds of the number of members of which it must consist*, one supervisory board chairman and one deputy. (2) If the necessary majority according to Section 1 is not achieved in the election of the . . . chairman or his deputy, a second ballot takes place. . . . In this ballot, the shareholder supervisory-board members elect the supervisory-board chairman and the jobholder supervisory-board members elect the deputy. . . ." [emphasis added].

Id. art. XXVII, app. at 155.

183. *Id.*

184. *Id.* at art. XXVII § 2, app. at 155.

185. The "managerial prerogative" of the owners of the enterprise is, after all, ultimately an incident of property and its protection as such is a rather delicate matter. It would seem that the balancing test used by the United States Supreme Court in *First National Maintenance* is an attempt to shield the NLRA from the same kind of challenge discussed here.

provides in part: "If a supervisory-board ballot results in a tie, the supervisory-board chairman has two votes in a renewed ballot on the same issue if it also results in a tie."¹⁸⁷ This mechanism is unreliable and "full of pitfalls."¹⁸⁸ In a situation where the shareholders' and workers' representative directors vote on a partisan basis, thereby dividing the votes equally, the issue will ultimately be resolved in the shareholders' favor since the chairperson is presumably always shareholder selected.¹⁸⁹

The final element of worker participation provided by the 1976 Act is the position of the *Arbeitsdirektor*.¹⁹⁰ This is a position on the *Vorstand*, or managing board, of the company with powers and rights equal to those of other *Vorstand* members. The exact duties of the *Arbeitsdirektor* are deliberately left vague by the Act.¹⁹¹ What is clear, however, is that the presence of this position on the *Vorstand* elevates matters of social concern and personnel questions to the *Vorstand* level.¹⁹²

Perhaps the "sharpest contrast"¹⁹³ between German and American

186. Codetermination Act of 1976, art. XXIX, J. FURLONG, *supra* note 4, app. at 155-56. See, e.g., M. PELTZER, *supra* note 153, at 2. Compare Codetermination Act of 1976, art. XXIX § 2, J. FURLONG, *supra* note 4, app. at 155-56 (tie-breaking under the Act) with Meissel & Fogel, *supra* note 6, at 187 (discussing the tie-breaking method under the draft of the bill of 1974).

187. Codetermination Act of 1976, art. XXIX, J. FURLONG, *supra* note 4, app. at 155.

188. M. PELTZER, *supra* note 153, at 2.

189. This ultimate shareholder control is augmented by the fact that the *Vorstand*, or managing board, "is entitled legally to appeal any *Aufsichtsrat* veto of its plan to a special meeting of the shareholders. The shareholders assembly may overrule such a [supervisory board] veto with a 3/4 majority." J. FURLONG, *supra* note 4, at 8. As a result of political compromise in the ruling coalition at the time the Act was passed, however, there is a more pragmatic limitation on worker-owner parity on the supervisory board. *Id.* at 96-97. This is the seat reserved for a managerial white-collar employee. Codetermination Act of 1976, art. XV § 2, *id.* app. at 147 ("The supervisory board must include at least . . . one managerial white-collar employee."). This "executive representative" would seem to have nothing to gain and everything to lose by voting consistently with worker representatives. For a discussion of the entire Act, see *id.* at 1-85; S. PEJOVICH, *supra* note 5, at 74-7. Codetermination Act of 1976, art. XXXIII, J. FURLONG, *supra* note 4, app. at 157. See also M. PELTZER, *supra* note 147, at 3 (discussing membership rights of the *Arbeitsdirektor*).

190. Codetermination Act of 1976, art. XXXIII, J. FURLONG, *supra* note 4, app. at 157. See also M. PELTZER, *supra* note 153, at 3 (discussing the *Arbeitsdirektor*).

191. Since the title is the same as a *Vorstand* member under the *Montan* Act, unions have urged the parallel be applied in practice under the Act. Whether this will take place is an open question. The reason for this vagueness was arguably, either in order to parallel the *Montan* sector *Arbeitsdirektor* as urged by the unions or, alternatively, to avoid the sticky business of defining such a position. If the provisions were left vague as a parallel, however, labor's victory is incomplete because a key to worker influence under *Montan* is that the person selected as *Arbeitsdirektor* is subject to veto by the workers representatives on the Board. J. FURLONG, *supra* note 4, at 12.

192. See M. PELTZER, *supra* note 153, at 3 (discussing the *Arbeitsdirektor*).

193. Summers, *supra* note 21, at 382.

workers' representation systems involves information. Under the German scheme, codetermination requires that worker representatives, whether on works councils¹⁹⁴ or on the supervisory board,¹⁹⁵ at least be informed and consulted about virtually every major decision of the enterprise. A great many decisions (ranging from personnel forms¹⁹⁶ to plant closures¹⁹⁷ and wages and hours¹⁹⁸) are not only subject to consultation but also to joint participation by labor and management. In contrast, in the United States, because many of these decisions are not mandatory subjects of bargaining, the employer can act unilaterally and labor is not entitled to notice or information.¹⁹⁹

B. German Conceptions of Industrial Democracy

"The fundamental tenet of *Mitbestimmung* advocates that democracy cannot be limited to the political sphere but must be extended to economic life as well."²⁰⁰ Viewed another way, "[c]odetermination belongs to the substance of the process of democratization" of German society.²⁰¹ The contradictions of political democracy and industrial oligarchy have been repeatedly discussed in the political arena:

In political life, you have equal rights because you can, for example, co-determine in Bundestag elections who should be your government's chief, and because your vote will carry exactly as much weight as the vote of any other citizen of this country. In your work, things are different. You have a lower rank than others.²⁰²

Like the Swedish theory,²⁰³ the German codetermination theory has an element of economic democracy in it.²⁰⁴ But the political pressure for

194. See, e.g., WORKS COUNCIL ACT, *supra* note 153, §§ 106 at 84-85 (discussing what information must be given to the economic committee), 90 at 74-75 (on information involving remodeling or construction), 111 at 88 (discussing information regarding closure, relocations, and mergers).

195. See Codetermination Act of 1976, art. XXXII, J. FURLONG, *supra* note 4, app. at 157.

196. See *supra* text accompanying notes 30, 35 and 36.

197. See *supra* text accompanying notes 139-142.

198. See *supra* text accompanying notes 143.

199. Summers, *supra* note 21, at 382-83.

200. J. FURLONG, *supra* note 4, at 28.

201. Address by *Bundeskanzler* W. Brandt (Jan. 18, 1973), quoted in S. PEJOVICH, *supra* note 5, at 57. For a discussion from a more sociological perspective, see *id.* at 57-67.

202. Address to the *Bundestag* by then Chancellor-to-be H. Schmidt (Jan. 1969), quoted in J. FURLONG, *supra* note 4, at 28 (discussing *Mitbestimmung*).

203. See *supra* text accompanying notes 109-21.

204. See, e.g., J. FURLONG, *supra* note 4, at 29 ("The . . . assertion [is] that labor and capital are equal because both are equally necessary to carry out productive work"). Cf. S. PEJOVICH, *supra* note 5, at 65 (a discussion of the aims of codetermination in terms of employees' personal rights).

control of corporate power in Germany has its roots in German history and, more specifically, in the unique recent German experience with National Socialism²⁰⁵ as well as the significant political reaction thereto. The seeds of such mechanisms are also found in conceptions of worker participation embodied in Article 165 of the Weimar Constitution.²⁰⁶ More importantly, these factors have come together and given rise to a degree of labor-management cooperation which makes the low German strike rate the envy of other European countries and the United States.²⁰⁷ As a union leader has put it: "[c]onflicts are resolved steadily, not once a year. There are no revolutions in truly co-determined companies."²⁰⁸

This "good relation with capital"²⁰⁹ on the part of German labor has been termed a partnership and has given rise to the discussion of European mechanisms as "consensus-building."²¹⁰ While saying that labor and capital in Germany view themselves as "social partners" might be an overstatement, it is clear that the ideology of cooperation is at work.²¹¹

Because of critical conditions following World War I and World War II, German employers [have] accepted the principle that employees should have the right to participate in one form or another in almost all of the decisions of the enterprise. The unions likewise [have] accepted the view that the interests of the employees and employers were not necessarily antagonistic and that they should share the responsibilities for management of the enterprise.²¹²

C. The Degree of Bifurcation of Worker Organization (Workers' Unions v. Workers Organized *qua* Workers)

The difference between Germany and the United States in the at-

205. J. FURLONG, *supra* note 4, at 29 (quoting from the record of hearings of the *Bundestag* Labor and Social Committee of Oct. 16, 1974, and citing a labor federation "tract" from 1968).

206. CONSTITUTION OF WEIMAR OF 1919, *Reichsgesetzblatt* [RGBI] at 1383. "The wage-earning and salaried employees are called upon to cooperate, with equal rights and in community with the entrepreneurs, on the regulation of wage and working conditions and on the total economic development of the productive forces." *Id.*, quoted in S. PEJOVICH, *supra* note 5, at 61.

207. J. FURLONG, *supra* note 4, at 30.

208. *Id.* at 31.

209. *Id.*

210. Marshall, *Government, Markets, and Consensus-Building Mechanisms*, 1982 NAT'L PRODUCTIVITY REV. 445, 448 (1982).

211. *Cf.* J. FURLONG, *supra* note 4, at 30-31. *Cf. also* S. PEJOVICH, *supra* note 5, at 80. (Executives and workers committees cooperated in ever more "institutionalized" ways.)

212. Summers, *supra* note 21, at 383.

mosphere and intensity of employer opposition to worker participation²¹³ may be largely due to the fact that worker participation in the United States is solely through the union, while worker participation in Germany, at least in the most sensitive areas of management, has been not through the union, but rather through the works council.²¹⁴ West German employers apparently are more willing to share the decision-making process with employee representatives once such representatives are perceived as a part of the enterprise rather than as "outsiders," as union officers and functionaries are often perceived by management.²¹⁵ "Indeed, some believe that German employers accepted works councils and agreed to expansion of their functions in order to limit the role of the union at the plant level."²¹⁶

The composition of the various employee representative bodies may give some insight into the issue. Works councils and employee representatives under the Enterprise Organization Act of 1952 are generally composed of employees²¹⁷ and not outside union officers or functionaries. Under the Codetermination Act of 1976 some of the seats on the board must be set aside for union representatives.²¹⁸ "This represented a significant change because, for the first time outside the coal and steel industry, the union, as contrasted with the employees, was guaranteed a voice in the management decisions of the enterprise."²¹⁹ Therefore, for the

213. See M. DERBER, *THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY 1856-1965* at 495-98 (1970) for a discussion of employer opposition in the United States.

214. Summers, *supra* note 21, at 384.

215. *Id.* at 373 ("[O]nce elected most works council members consider themselves to be representatives of the workers in the shop, not arms or agents of the union." [footnote omitted]). See also *id.* at 373 n.9 ("There may be close cooperation between the . . . works council and the . . . union representatives, but . . . [they] remain distinct.")

216. *Id.* at 384. The fear of works councils felt by Swedish trade unions is based at least in part on their success as a mechanism of worker participation in Germany. See *supra* notes 52-53 and text accompanying notes 54-56.

217. In the case of the Enterprise Organization Act, "[i]f the firm's charter prescribes six council [board] members, which requires two labor representatives, only employees of the firm are eligible for the supervisory council. In the case of more employee representatives, at least two must be members of the respective firm." S. PERJOVICH, *supra* note 5, at 71. Additional members may come from outside, but there is no requirement that they do. By contrast, the Codetermination Act of 1976, art. XVI § 2, J. FURLONG, *supra* note 4, app. at 149, requires "outside" union representation from two or three of the labor representatives. Therefore union representation on the board is less likely to occur under the 1952 Act.

In the case of works councils, unions have a role in nominating candidates. See *WORKS COUNCIL ACT*, *supra* note 132, § 14 at 30-1. In spite of this, "once elected most works council members consider themselves . . . not [to be] arms or agents of the union." Summers, *supra* note 21, at 373 [footnote omitted].

218. Codetermination Act of 1976, art. XVI § 2, J. FURLONG, *supra* note 4, app. at 149.

219. Summers, *supra* note 21, at 384.

first time, the workers would be required to choose "outside" representatives to speak for them on the supervisory board.²²⁰ Nonetheless, both works councils and supervisory board representation schemes provide for election by workers of their representatives to these bodies.²²¹ As a final note, the Works Council Act of 1972 provides the individual employee with a catalog of personal rights independent of his rights as a part of the collective group of "employees."²²²

VI. FACTORS IN THE UNITED STATES LABOR RELATIONS ENVIRONMENT THAT AFFECT THE TRANSFERABILITY OF EUROPEAN MECHANISMS FOR PARTICIPATION

The perspectives on managerial prerogative and worker participation which can be gained from evaluation of the West German and Swedish systems provide a background against which American labor law, and in particular the scope of mandatory subjects of bargaining under the NLRA, can be evaluated. "This does not mean, [however, that] we can borrow from another system; legal rules transplanted from one social body to another are likely to be rejected."²²³ The purpose of such analysis is not to transfer the European systems to the United States but rather to examine the possibility for change and the range of potential solutions.

In light of the rather exclusive focus of the NLRA and its underlying premise that collective bargaining is *the* American method of worker participation, the mechanisms of worker codetermination employed in European nations probably could not be implemented under existing law. A key problem is that works councils and worker representative members on the board of directors of a United States corporation might be violative of section 8(a)(2) of the NLRA, in that either could be viewed as an attempt by the owners "to dominate or interfere with the formation or administration of any labor organization, or contribute financial or

220. "The list of candidates is not established by the electorate . . . but the labor unions themselves. Accordingly, the electorate has no [direct] influence on the choice of a candidate. . . ." M. PELTZER, *supra* note 153, at 149.

221. WORKS COUNCIL ACT, *supra* note 132, §§ 7-20 at 26-34, 124; Codetermination Act of 1976, arts. X-XVIII, XX, J. FURLONG, *supra* note 4, app. at 143-50, 150-51. As to board representatives, the Codetermination Act of 1976 makes direct election optional, providing (through electors) for both direct and indirect election.

222. See WORKS COUNCIL ACT, *supra* note 132, §§ 81-5 at 69-71.

223. Summers, *supra* note 21, at 368 [emphasis added]. But cf. Hyde, *Beyond Collective Bargaining: The Politicization of Labor Relations under Government Contract*, 1982 WISC. L. REV. 1, 38-9 (1982) (American labor relations are not as primarily determined by workplace presence as is traditionally portrayed).

other support"²²⁴ Conversely, it has been urged that employee and shareholder-director cooperation would subject the union to charges of violating section 8(b)(1)(B) of the NLRA which prohibits a union from "restrain[ing] or coerc[ing] . . . an employer in the . . . adjustment of grievances."²²⁵ The history of employee representation schemes as "shams to forestall unionization and give employees no real voice"²²⁶ has so colored both labor relations law in the United States, and more particularly the law embodied in the Wagner Act, that any attempt to transplant European solutions would be difficult, if not impossible.

In the United States the law generally disfavors the use of administrative or legislative solutions to the problems of employer-employee relations.²²⁷ These problems are usually left to the market forces of relative bargaining power. As a result, "[t]he primary source of rights and of law in the private-sector organized workplace is the collective bargaining contract."²²⁸ Indeed, since World War II, the American courts have placed a great deal of emphasis on enhancing the enforceability of the collective bargaining agreement.²²⁹

A brief look at some of the history of industrial democracy in the United States will shed additional light on this matter. Senator Wagner urged, and Congress adopted in the NLRA, a scheme of industrial democracy based on concepts of industrial self-government and worker/owner negotiations, rather than extensive legislative involvement or governmental ownership. The NLRA was predicated on notions of majority rule and organizational unit by organizational unit negotiations rather than industry-wide or centralized bargaining.²³⁰

224. 29 U.S.C. § 158(a)(2) (1982); Blackburn, *Worker Participation Corporate Directorates: Is America Ready for Industrial Democracy?*, 18 HOUSTON L. REV. 349, 364 (1981) (what constitutes "junior board"); Summers, *supra* note 21, at 40 ("With few exceptions the National Labor Relations Board has found such representation structures [established in place of an adversarial union] to be unlawful employer-dominated unions." (footnote omitted)).

225. 29 U.S.C. § 158(b)(1)(B) (1982); *but see* Blackburn, *supra* note 224, at 366 (discussion of methods of circumventing these conflicts).

226. Summers, *supra* note 21, at 41 (footnote omitted); *id.* at 375-76 (the effect of "company unions" on the NLRA in 1935).

227. THE POLITICS OF LAW, A PROGRESSIVE CRITIQUE 70-71 (D. Kairys ed. 1982) [hereinafter cited as Kairys]. *See also* H.K. Porter Co. v. NLRB, 397 U.S. 99, 103-04 (1970).

228. Kairys, *supra* note 227, at 71.

229. *Id.*

230. Senator Wagner, the author of the 1935 National Labor Relations Act, used terms reminiscent of Gallatin to justify the requirement that employers recognize and bargain with the representatives of the majority of their employees: "[D]emocracy in industry must be based upon the same principles as democracy in government. Majority rule, with all its imperfections, is the best protection of workers' rights, just as it is the surest guaranty of political liberty that mankind has yet discovered." Con-

Under the NLRA, "[t]he only permissible form of industrial democracy is collective bargaining conceived as an adversarial collective bargaining process."²³¹ Consequently, the rules of industrial relations under the NLRA require employees to choose either to be represented by a union which bargains at arms length and on an adversarial basis with the employer, or not to be represented at all.²³² In short, "[a]ny natural dichotomy between the interests of employees and management is accentuated by the adversarial roles played by unions and management in the collective bargaining system established by federal labor legislation in the United States."²³³

One additional complicating factor in consideration of transferability of European mechanisms is the federal nature of United States government.²³⁴ State law controls matters of corporate structure and the division of powers between shareholders and directors.²³⁵ Since the worker representative-director provisions of European worker participation plans would involve, *inter alia*, reorganization of internal corporate structures, there are a great many pragmatic problems such proposals would face.²³⁶

Notwithstanding such difficulties in transferability, however, the

gress decided that employee participation in industrial life would take place within a model of worker-owner negotiations regarding those issues which directly concern employees: wages, hours, and terms and conditions of employment. Furthermore, these negotiations would take place on a company-by-company basis. Congress then implicitly rejected large scale governmental regulation of wages, hours, and terms and conditions of employment, along with direct governmental or worker ownership. Unfortunately, the scheme of industrial democracy envisioned by Senator Wagner has not been realized. Collective bargaining agreements do not cover seventy percent of the American work force.

Angel, *Professionals and Unionization*, 66 MINN. L. REV. 383, 396 (1982) (footnotes omitted).

231. Summers, *supra* note 21, at 41. *Cf. id.* at 34.

The expectation and promise of the Wagner Act was to make possible for all employees a system of industrial democracy. Collective bargaining would become the established and accepted form of industrial relations. Through collective bargaining employees would have an effective voice, would be able to protect their own interests, and would achieve human dignity. . . .

This was the promise of our national labor policy—industrial democracy through collective bargaining.

Id. Indeed, "the primary purpose [of the NLRA] was to give employees an effective voice, through collective bargaining, in determining the terms and conditions of their employment."

Id.

232. *Id.* at 41.

233. Blackburn, *supra* note 224, at 364.

234. Marshall, *supra* note 210, at 448.

235. See N. LATTIN, *THE LAW OF CORPORATIONS* 170-200 (2d ed. 1971).

236. A brief discussion of such problems can be found in Blackburn, *supra* note 224, at 357-58.

two European examples provide a guide as to just how far the decision-making process can be subjected to codetermination without infringing on that "core" of entrepreneurial decision-making power which Western values of private ownership require that management retain.

VII. A DISTINCTIVELY AMERICAN PROPOSAL FOR WORKER PARTICIPATION OPPORTUNITIES UNDER THE NLRA

The degree of social and political acceptance of industrial democracy and the general labor relations environment in the United States is sufficiently distinct from that in West Germany and Sweden to relegate any statutory restructuring of the participatory mechanisms available in the United States to the realm of speculation and academic discourse.²³⁷ Moreover, while it is true that Congress could review the NLRA and urge a broader reading of the appropriate sections (particularly section 8(d)), it is not likely to do so and rewording the statute is unnecessary. Congressional intent and judicial precedent leave ample room for the adoption of a more balanced and flexible test in determining just what constitutes the outer limits of the duty to bargain. Under the terms of the statute, the courts are free to mold a test which would allow greater opportunities for workers to participate in a broader range of decisions affecting their working lives, both through their unions in the collective bargaining process and through mechanisms provided for in collective bargaining agreements.

The analysis suggested here is based on United States conceptions of industrial democracy²³⁸ and the statutorily declared judgment of Congress that "protection by law of the right of employees to . . . bargain collectively safeguards commerce [and that it is the] policy of the United States [to] encourag[e] the practice and procedure of collective bargain-

237. Even the use of a statutory restructuring might not allow such mechanisms as works councils and perhaps even employee representation on a board of directors. Congress at least theoretically, however, could easily enough adopt an amendment to the NLRA like Section 32 of Sweden's Act on Joint Regulation of Working Life, SFS 1976:580, Joint Regulation Act § 32, F. SCHMIDT Translation, *supra* note 59, at 239. Such an amendment could provide that as between parties to a collective bargaining agreement, if the employees so request, there be a "collective agreement on a right of joint regulation for the employees in matters which concern the conclusion and termination of contracts of employment, the management and distribution of the work and the activities of the business in other respects." To be more in line with the NLRA generally, such an amendment could merely include requests for joint regulation agreements among those subjects of bargaining listed in Section 8(d). Such an amendment would keep collective agreements at the center of labor relations law, but would still signal a radical departure from current labor policy.

238. See *supra* text accompanying notes 227-33.

ing"²³⁹ The purposes of the NLRA can be better served, and the scope of mandatory bargaining under section 8(d) of the Act can be broadened, without trampling on the concept of managerial prerogative and the entrepreneur's interest in safeguarding the viability and profitability of his or her enterprise. This can be done by considering worker and union interests in the balancing of interests which takes place when considering whether a topic should appropriately be included within the scope of "terms and conditions of employment," and thereby be deemed a mandatory subject of bargaining. To do so, however, the test for determining whether a topic is one which appropriately falls within the ambit of "terms and conditions of employment," and is, therefore, a mandatory subject of bargaining, should be modified.

As the Supreme Court has articulated the test in *First National Maintenance Corp. v. NLRB*,²⁴⁰ the "employer's need for unencumbered decisionmaking" should be the backdrop against which "bargaining over management decisions that have a substantial impact on the continued availability of employment" is decided.²⁴¹ Within this context, bargaining "should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business."²⁴² This formulation of the test suggests that the scales are already tipped in the employer's favor even before the balancing begins.²⁴³ Preloading the scale, however, is not necessary. So long as certain decisions are ultimately left to the managerial discretion of the owners and a certain degree of unilateral decision-making is reserved to the shareholders or their representatives, the workers can be a productive source of input, and their participation will not upset the inci-

239. National Labor Relations Act § 1, 29 U.S.C. § 151 (1982).

240. 452 U.S. 666 (1981).

241. 452 U.S. at 679.

242. *Id.* It is important to note that the *First National Maintenance* analysis refers to at least two groups of decisions: (1) a group of decisions in which the benefits to labor-management relations and the collective bargaining process of bargaining are presumptively too attenuated and, therefore, never to be subjected; and (2) another group in which the benefits to labor-management relations and the collective bargaining process are so great that such topics are "almost exclusively" within the collective bargaining arena. *Id.* This fact supports the contention that while the Court "balances," it has, in these cases, already determined the value of bargaining about such subjects without the benefit of reviewing the particular fact situations in which they occur (*i.e.*, the scales are tipped by the Court's presumptions about the suitability of the topic in general and not by the facts of the case before it).

243. The test presumes the existence of certain employer interests and a hierarchy of employee interests. One would assume this is done to protect that "core" of interests called managerial prerogative. *See, e.g.*, Atleson, *supra* note 33, at 94-5 (discussing "hidden" judicial values in this "balancing").

dents of private ownership.²⁴⁴ The European experience indicates that a real balancing of interests without a judicial presumption in favor of the owners would be an appropriate starting point.

If the *First National Maintenance* balancing test is not cognizant of worker interests, as is urged here, lower court decisions rendered before *First National Maintenance* demonstrate how workers' interests are to be balanced if they are to be afforded a place in the balancing process.²⁴⁵ The idea of balancing competing interests under the NLRA in order to achieve the proper scope for terms of the Act can be seen in a pre-*Fibreboard*²⁴⁶ case, *John Wiley & Sons, Inc. v. Livingston*.²⁴⁷ In that case, the United States Supreme Court, while discussing the scope of negotiations under the Act, stated that "[t]he objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship."²⁴⁸ Cases decided after *Fibreboard* but before *First National Maintenance* also indicated that an analysis of the competing interests was necessary in determining whether section 8(d) was appropriate to a particular situation.²⁴⁹ For example, in *Ozark Trailers, Inc.*,²⁵⁰ a case arising after *Fibreboard*, the NLRB, citing *John Wiley & Sons, Inc.*, set out an argument which provides a relatively clear course to the test proposed below:

[W]e do not believe that the question whether a particular management decision must be bargained about should turn on whether the decision involves the commitment of investment capital, or on whether it may be characterized as involving "major" or "basic" change in the nature of the employer's business. . . . An employer's decision to

244. See, e.g., *Brockway Motor Trucks v. NLRB*, 582 F.2d 720, 734 (3d Cir. 1978) ("both sides of the controversy, the employer's and the employees', should be seen as crucial, and one should not be exalted to the exclusion of the other.")

245. Concededly, it is arguable that the workers' interest could have been implicitly considered in the determination of the benefit to the collective bargaining system. Nevertheless, how this was done is a matter of pure speculation.

246. *Fibreboard*, 379 U.S. 203 (1964).

247. 376 U.S. 543 (1964).

248. *Id.* at 549.

249. See, e.g., *NLRB v. Royal Plating & Polishing Co., Inc.*, 350 F.2d 191, 195 (3d Cir. 1965) ("in each case the interests of the employees and the purpose of the [Act] . . . must be carefully balanced against the right of an employer. . . ."); *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108 (8th Cir. 1965) (measuring the limits of the duty by how much it infringes on management's decision-making). Cf. *Fibreboard*, 379 U.S. 203 (1964). (Although the Court never uses "balancing" terminology, it discusses the competing interests).

250. 161 N.L.R.B. 561 (1966).

make a "major" change in the nature of his business . . . is also of significance for those employees whose jobs will be lost by the termination.

. . . .

And, just as the employer's interest in the protection of his capital investment is entitled to consideration in our interpretation of the Act, so too is the employee's interest in the protection of his livelihood.²⁵¹

The first sentence above rejects any single factor analysis which considers only the interests of the employer, the second asserts the interests of the workers *qua* workers and the third urges that the interests of the workers be truly considered as a competing interest in any balancing test to determine if a topic of bargaining is mandatory or merely permissive.

In light of this argument, a more appropriate test would interpret the phrase "terms and conditions of employment" broadly. As the U.S. Supreme Court recently stated:

[T]he 1947 Congress deliberately rejected the Hartley Bill's proposed restrictions on mandatory bargaining, and instead adopted the phrase 'wages, hours and other terms and conditions of employment' from the Wagner and Norris-LaGuardia Acts, in which this language was understood to be expansive. Indeed, the 1947 history shows that Congress used the phrase 'conditions of employment' to preclude a narrow construction of the scope of collective bargaining.²⁵²

An appropriate balancing test should be expressed essentially as it was in a case decided by the Third Circuit shortly after *Fibreboard*:²⁵³ "The words used by Congress in this section are broad and in each case the interests of the employees and the purpose of the National Labor Relations Act in securing industrial tranquility²⁵⁴ must be carefully bal-

251. *Id.* at 566.

252. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495-96 (1979) (discussing the LMRA's legislative history); NAT'L LABOR REL. BOARD, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 313-14, 362, 799, 998, 1050 (1947); Amicus Brief for AFL-CIO and UAW at 15, *First National Maintenance*, 452 U.S. 666. See also *Order of Railroad Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330, 335 (1960) (stating that in the Norris-LaGuardia Act, "Congress made the definition broad because it wanted it to be broad").

It is also arguable that Congress wished the courts to give considerable deference to the decisions of the experts (*i.e.* the NLRB) in dealing with such matters. See Atleson, *supra* note 33, at 106 (citing a minority report of the 80th Congress in 1947).

253. *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191 (3d Cir. 1965). The endorsement of the *Royal Plating* terminology does not necessarily carry with it an endorsement of the result in that case.

254. I would add the following: "through the process of collective bargaining." See, *e.g.*, National Labor Relations Act § 1, 29 U.S.C. § 151 (1982) ("encouraging the practice and procedure of collective bargaining . . . for the purpose of negotiating the terms and conditions of employment. . ."). See also *Brockway Motor Trucks*, 582 F.2d at 734 ("[W]e must con-

anced against the right of an employer to run his business."²⁵⁵ This would explicitly add to the balancing equation such worker interests as the investment of years of working life, the number of jobs affected and the employees' accrued economic stake in the enterprise.²⁵⁶ Therefore, under the test proposed here, the interests of the employer would be balanced against the interests of the workers consistent with the purpose of the Act: to subject topics of concern to labor and management to the collective bargaining process.

By balancing all the interests, this test would allow a consideration of the effects of mandatory bargaining on all of the parties. Unlike the current test, the harm to both employee participation and managerial decision-making interests, and not just the limitations on the prerogatives of managerial direction, would be expressly considered.

The underlying value judgment made by Congress that employers and their employees should work together to establish mutually satisfactory conditions of employment through a collective bargaining process overseen and refereed by the NLRB,²⁵⁷ which is a central element of the *First National Maintenance* test, is not disturbed.²⁵⁸ The proposed test would open the door to new areas of worker participation by giving the workers' interests express consideration in the determination of whether a subject is mandatory or not. Nevertheless, where, in the circumstances of the particular case, the employer could show grave hardship if bargaining were mandatory, then mandatory bargaining would not be required.

The European example shows that the point at which the interest of the workers is outweighed by the need for control of the enterprise by the owners or shareholders (*i.e.* the point at which the law should say that the further expansion of worker participation in control of the enterprise would interfere with managerial prerogative) can be located. Short of this point, however, decisions will be codetermined by representatives of the workers and of the owners.²⁵⁹ Against this backdrop, it is clear that a balancing of managerial and worker interests within the framework of collective bargaining negotiations can broaden the range of codetermina-

template the theory of collective bargaining embodied in the NLRA: a commitment to the efficacy of a framework of discussion and compromise between the parties to labor disputes.").

255. 350 F.2d at 195.

256. *Ozark Trailers, Inc.*, 161 N.L.R.B. 566.

257. *See H.K. Porter Co. v. N.L.R.B.*, 397 U.S. 99, 102 (1970).

258. *First National Maintenance*, 452 U.S. 666, 674 and n.11 (citing NLRA § 1, 29 U.S.C. § 151, and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)).

259. *See supra* text accompanying notes 109-21 and 200-12.

tion of workplace decisions without treading on those managerial prerogatives at the core of private ownership.

VIII. A WORKER PARTICIPATION HYPOTHETICAL

As this Note has demonstrated, the current test for the scope of "terms and conditions of employment" under section 8(d) of the NLRA, as articulated by the United States Supreme Court in *First National Maintenance*, does not adequately consider the interests of the workers and their union. The post-*Fibreboard*, pre-*First National Maintenance* formulation of the test, which includes the interest of the employees and their union, the purposes of the NLRA, the collective bargaining process as a whole and the degree to which such negotiations will hamper the owners and interfere with their control of the enterprise in deciding whether particular issues fall within the mandatory bargaining provisions of the NLRA, seems the fairer test.

In order to illustrate how this test would work, a hypothetical problem will be subjected to three tests: a West European codetermination scheme, the current United States Supreme Court "balancing" as represented by the *First National Maintenance* decision and the proposed test. For the purposes of illustration, domestic Company X is a large producer of goods for a broad international market. The company has several domestic plants and seeks to close one of its facilities and move its machinery to another facility in an area of the country with lower labor costs. Closure of the plant will inevitably put some, if not all, of the employees out of work.²⁶⁰

A. European System

Under the European schemes,²⁶¹ this relocation of facilities and the

260. Interestingly, the National Labor Relations Board itself has recently considered the relocation of work from a union contract-covered facility and the reassignment of work to nonbargaining unit employees within the same facility. *Milwaukee Spring Div. of Ill. Coil Spring Co.*, 268 NLRB No. 87 (1984) (popularly known as *Milwaukee Spring II*). Since the Board resolved the issue on the basis of whether or not the case involved a contract modification (holding that it did not), it left open the issue of whether or not relocation was a mandatory bargaining subject. *Id.* at 3-4 n.5, 7, 8. The Board, recognizing the limitations imposed by *First National Maintenance*, nonetheless seemed to indicate that in its view, such relocations *could be* mandatory topics. See NLRB GC Memorandum 84-4 at 2, 3 and 4 indicating that the "context" of Board's remarks indicates that the majority agree with dissenting Member Zimmerman that these are "mandatory" topics. See also *Milwaukee Spring II*, 268 NLRB No. 87 at 11 (citing *University of Chicago v. NLRB*, 514 F.2d 942, 949 (7th Cir. 1975)).

261. The primary purpose of using the European mechanism at this point is to illustrate just how much influence workers can have on a decision which might be entirely excluded

plant closing would be squarely within the range of topics subject to codetermination. Under the German Works Council Act of 1972, structural changes²⁶² must be agreed upon by management and the works council of the enterprise.²⁶³ With regard to such changes it is not sufficient for the employer merely to inform the works council; it must get the consent of the works council.²⁶⁴ If the parties cannot agree, the Act provides for mediation by a conciliation board, but ultimately the parties must reach an agreement;²⁶⁵ absent some kind of extraordinary circumstance, management cannot act unilaterally.²⁶⁶ In Sweden, the works council, barring a collective agreement expanding its codetermination functions,²⁶⁷ is entitled only to information about, not a voice in, the matter of relocation.²⁶⁸ Under the Joint Regulation Act,²⁶⁹ management would have an additional duty of providing information to the union.

A decision to relocate would probably come before the board of directors in a Swedish company. Such a decision would come before the supervisory-board in a German company, but only in the form of a question needing ratification after the preliminary decision has been made. There are some topics which come before the boards in which workers may not participate. Those topics, however, are primarily related to conflict of interest²⁷⁰ and do not include such matters as the relocation and closing presented in the hypothetical. While the shareholder representa-

from worker participation in this country (under the mandatory subject of bargaining analysis discussed in this Note) without trampling on that "core" of entrepreneurial interests which both the Swedish and German systems have sought to protect. In other words, this analysis is used to provide an "outer limit" against which the proposed and current American tests can be measured.

262. WORKS COUNCIL ACT, *supra* note 132, § 111 at 88. If the question were of the "effects" alone, however, the parties might lose their right to decide on a conciliation board on which each would be represented if they cannot agree. *Id.* at 4 (translator's introduction). See *supra* text accompanying notes 139-42 (a relocation or closing is a structural change under the Act).

263. While the hypothetical leaves the number of employees purposefully vague to allow freer discussion of possibilities under the legislation in question, for the sake of discussion, the number of employees involved here is presumed to be sufficient to require a works council. See *supra* text accompanying note 134.

264. WORKS COUNCIL ACT, *supra* note 132, at 2-3 (translator's introduction) (the quoted language commenting on hiring and firing, but making a comment which is applicable across the board on decisions covered by the Act). See generally *id.*, *passim*.

265. See WORKS COUNCIL ACT, *supra* note 132, § 124 at 108-10.

266. See *id.* §§ 111-12 at 88-9.

267. Joint Regulation Act, § 32, F. SCHMIDT Translation, *supra* note 59, app. 1 at 230.

268. *Id.* at 115-16.

269. Joint Regulation Act § 19, *id.* app. 1 at 237. Cf. *id.* at 116.

270. For the Federal Republic of Germany, see Aktiengesetz 1965 [BGBI] at 1185 § 17; for Sweden see Board Representation Act, ANGLO-SWEDISH COMP. STUDY, *supra* note 60, at 148.

tives have a majority of the votes on these boards,²⁷¹ workers could participate in the discussion of these matters and could influence the outcome of the decision-making process.²⁷²

With respect to collective bargaining, the Swedish example provides workers with the greater voice.²⁷³ German collective bargaining agreements have remained narrow in focus²⁷⁴ and most of the codetermination functions that would be performed by the local unions in Sweden are performed by works councils in Germany. Under the Swedish Joint Regulation Act, however,

[p]arties who enter into a collective agreement on wages and general conditions of employment *should*, if the employee side so requests, also make an agreement 'on a right of joint regulation for the employees in matters which concern the conclusion and termination of contracts of employment, the management and distribution of the work, and the activities of the business in other respects.'²⁷⁵

Therefore, if the union during the course of negotiations over the agreement on wages and other conditions of employment, requests that there be a joint regulation agreement setting out codetermination rights concerning matters designated by the statute as subjects of such a joint regulation agreement, and any such matter which the union has requested to be provided for in the agreement is not provided for, the workers retain "a surviving right to industrial action."²⁷⁶ They are not bound by the peace obligation²⁷⁷ which attaches to the remainder of the agreement.²⁷⁸

271. Two-thirds of the representatives are shareholder affiliated in smaller German companies. See *supra* text accompanying notes 165-72. One-half plus a second vote for the chair constitute the shareholder majority in larger German companies. See *supra* text accompanying notes 173-89; see also *supra* n.159 (as to the nonlabor majority in the *Montan* sector). Generally two seats are reserved for workers in Sweden. See *supra* text accompanying notes 63-68.

272. For a relatively comprehensive discussion of how this works in practice for closely related topics (e.g., closings and reorganizations) in the codetermination experiences of the *Montan* sector in Germany, see J. FURLONG, *supra* note 4, at 42-58.

273. Many of the same types of agreements called for by the Joint Regulation Act in Sweden between union and management are called for by the Works Council Act of 1972 in Germany between works councils and management. Compare text accompanying notes 77-108 with text accompanying notes 132-52. While areas of potential participation are essentially the same, the mechanisms by which such participation takes place are different—works councils in Germany and unions in Sweden. See generally Summers, *supra* note 50.

274. See Summers, *supra* note 21, at 380.

275. Joint Regulation Act § 32, F. SCHMIDT Translation, *supra* note 59, app. 1 at 239.

276. Joint Regulations Act § 44, *id.* app. 1 at 241-42. Cf F. SCHMIDT, *supra* note 50, at 147 ("In such a case, therefore, the employer will still retain his powers to make decisions, but will no longer exercise them with the backing of a peace obligation under the Act.").

277. See Joint Regulations Act §§ 41-5, F. SCHMIDT Translation, *supra* note 59, app. 1 at 241-42.

Therefore, although the employer's freedom of decision is safeguarded,²⁷⁹ it is not protected by statute (as it would be protected in a matter falling within the peace obligation) from an industrial action to pressure it to allow worker participation in the decision.²⁸⁰

In Germany, therefore, the decision involved in the hypothetical would need the consent of the works council, on which only employees sit, and of the supervisory board, on which the employees have a minority but strong presence. Management would not only have to justify its decision to a board of directors on which workers would have a strong voice, but would also ultimately have to accommodate the workers' representatives on the works council at the facility involved unless there were extraordinary circumstances justifying unilateral action.

Management in Sweden would have to inform the works council and the union of its decision. It might have to provide them with additional information as well. The board of directors, with its workers representatives, would have an opportunity to review the decision. The worker voice, however, would be felt primarily in the bargaining arena where the employees could demand to bargain about the decision. If management refused, the workers could strike. On the other hand, in many cases the workers would have bargained for a codetermination mechanism for resolution of such issues and the fate of the decision to close the plant and relocate the machinery would depend on the outcome of the codetermination process.

This discussion has provided an outline of the process within which the European worker may participate in the major decisions of his or her enterprise—here, relocation and partial closure. By indicating where worker input can be overcome by shareholder decision-making power, it has delineated the "outer limits" beyond which worker influence has not been permitted to go. On the other hand, by discussing the great degree of worker input and cooperative decision-making between employer and employee which can go on under the two systems described here, it has

278. The union could, for example, demand that any decision which would result in a termination be subjected to works council review of the type present in Germany. *See supra* text accompanying notes 133-38. If the parties agreed, the provision would be part of the agreement. If they failed to agree, the management would be free to make such a decision, but the union could then engage in industrial action to achieve its codetermination aim since it raised the issue during negotiations.

279. Unless, in the interest of industrial peace, it has decided to make concessions in these areas.

280. Recall that some employers could reach collective agreements with unions on a method of codetermination through a process not discussed above which would still provide the worker with methods of input. For some interesting suggestions on such agreements see F. SCHMIDT, *supra* note 50, at 149.

also pointed out the opportunities for worker-employer codetermination which can exist within these limits.

B. Current Test

Under the *First National Maintenance* standard,²⁸¹ the decision would depend on various factors but would probably result in a decision that the hypothetical topic would probably not be an appropriate subject for mandatory labor-management bargaining. The burden imposed by bargaining on the interests of management would be balanced against the benefits to the "establishment and maintenance of industrial peace to preserve the flow of interstate commerce,"²⁸² and the "promotion of collective bargaining as a method of defusing and channeling conflict between labor and management."²⁸³ The outcome of this "balancing" is determined by asking whether the decision to be negotiated involves a change in "the scope and direction of the enterprise, is akin to the decision whether to be in business at all,"²⁸⁴ or is "'not in [itself] primarily about conditions of employment, though the effect may be necessarily to terminate employment.'"²⁸⁵ In addition, a court may ask if this is an issue dealing with an "aspect of the relationship between the employer and the employees."²⁸⁶

One factor in deciding whether the subject should be made mandatory is the determination that either the decision is "amenable to resolution through the bargaining process," and therefore should be subjected to the process, or that it is one in which "[m]anagement must be free from the constraints of the bargaining process,"²⁸⁷ and therefore should not be subjected to the bargaining process. In *Fibreboard*, the Court determined that the matter was "peculiarly suitable for resolution

281. *But see* *Weather Tamer, Inc. v. NLRB*, 676 F.2d 483, 493 (11th Cir. 1982), holding that whether an employer "had a duty to bargain with the Union regarding the decision to close . . . has been resolved by the Supreme Court," and that "an economic decision to close part of a business is not a mandatory subject of bargaining under § 8(d) and § 8(a)(5) [footnote omitted]." The analysis here does not deny that the 11th Circuit's holding is practically true, but only that the Supreme Court has enumerated a more general test, in the form of balancing, which has broader implications than a per se rule as to partial closings.

It is important to note at the outset that the Supreme Court has not, to date, passed on the questions raised in the hypothetical.

282. *First National Maintenance*, 452 U.S. at 674 (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)).

283. *Id.*

284. *Id.* at 677.

285. *Id.* (quoting *Fibreboard*, 379 U.S. at 223 (Stewart, J. concurring)).

286. *Id.* at 676 (quoting *Chemical & Alkali Workers v. Pittsburg Plate Glass Co.*, 404 U.S. 157, 178 (1971)).

287. *Id.* at 678.

within the collective bargaining framework."²⁸⁸ This conclusion, based on industrial practice and an evaluation of the effect of the decision on management's freedom to direct the enterprise, seems to mark the line between those subjects appropriate for mandatory bargaining and those where employer interest outweighs the interest in subjecting the topic to the bargaining process.

In the hypothetical case, the interests of the respective parties, while not identical to those in *First National Maintenance*,²⁸⁹ are sufficiently parallel for a court to reach the same holding. Despite the fact that the decision will have "substantial impact on the continued availability of employment,"²⁹⁰ the decision is so like the decision to go out of business or to close part of the operations that the benefits derived from "requiring bargaining over the decision itself"²⁹¹ will not outweigh the "harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons."²⁹² This is because the interests of the employer in "manag[ing] its affairs unrelated to employment"²⁹³ (especially if such interests deal with "capital investments")²⁹⁴ and in making decisions focusing "only [on] the economic profitability" of the facility²⁹⁵ would probably outweigh the "incremental benefit [to the process and/or purpose of the Act] that might be gained through the union's participation in making the decision."²⁹⁶

288. *Id.* at 680 (quoting *Fibreboard*, 379 U.S. at 214.)

289. *See supra* text accompanying notes 35-9.

290. *First National Maintenance*, 452 U.S. at 679.

291. *Id.* at 681.

292. *Id.* at 686.

293. *Id.* at 677. This is a reference to its ownership activities which presumptively have too attenuated a relationship to employment to fall within "terms and conditions of employment." *Id.* at 676-77 (citing *Fibreboard*, 379 U.S. at 223).

294. *See id.* at 680 (quoting *Fibreboard*, 379 U.S. at 214).

295. *Id.* at 677. The Court has stated that "Congress had no expectation that the elected union representative would be an equal partner in the running of the business enterprise" and any efforts to mandate bargaining directed at that area are seen as encroaching on the prerogatives of management. *Id.* at 676-677.

296. *Id.* at 686. This Note does not endorse this outcome. The Court itself intimated "no view as to . . . plant relocations. . . ." *Id.* at 686 n.22. Nevertheless, a move spurred by "antiunion animus" would be counter to the requirements of the Act and therefore would not exclude a duty to bargain. *See Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965).

In addition, despite the fact the employer would not be required to bargain about the closing and relocation, it would probably be required to bargain about the "effects" of such a move. *First National Maintenance*, 452 U.S. at 677-678 n.15. *See also* *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d at 196.

C. Proposed Test

Under the proposed test, the evaluation would be much more flexible.²⁹⁷ It would favor, except in unusual or extraordinary circumstances, subjecting the topic to the collective bargaining process, and if that failed to yield a satisfactory result, to an economic contest of the parties.²⁹⁸ Under the test proposed, neither side would have any presumptive interests.²⁹⁹

Management could be required to demonstrate from the factual situation in question how its interests in the "viability" and "profitability" of the enterprise would be harmed if it were forced to bargain. Such interests as whether there was a "major" or "basic" change in the course of the enterprise or whether there was a need for greater flexibility or secrecy to ensure a proper recoupment for the sale of capital goods or the like could serve as the basis of argument against requiring bargaining.³⁰⁰

Workers or their union could demonstrate interests manifested in their jobs, *i.e.* the number of jobs that could be affected or lost, investment of years of working life, "accumulat[ed] seniority, accru[ed] pension rights and . . . skills that may or may not be salable to another employer."³⁰¹ The interest in promoting the purposes of the Act would point to subjecting the topic to the collective bargaining process since "[d]irect negotiations by the disputants is viewed as helpful both to the nation, which thereby can be spared to some extent the disruptive products of a lack of communication between labor and management, and to the participants themselves, who thereby are put in a position of listening to the other side and understanding, if not agreeing, with [sic] the opposing view."³⁰² If the topic were situationally unsuitable for the collective bargaining process (as would be the case if utmost secrecy were required to prevent discovery by competitors of the sale of a division) or its incremental benefit were either nonexistent or very small, even this interest

297. The issue of "animus" and bargaining over "effects" would not be disturbed by the new test and, therefore, is not discussed in this Note.

298. An obligation to confer or bargain in good faith is not the same as a compulsion to agree, and ultimately such decisions would rest with the employer. *See supra* text accompanying notes 32-34.

299. *Cf. Brockway Motor Trucks*, 582 F.2d at 734 (one side's interests "should not be exalted to the exclusion of the other."). *See also* Atleson, *supra* note 31, at 107 (stating his view that the *First National Maintenance* test does not require that any of the employer's presumptive interests actually be present).

300. *See, e.g., First National Maintenance*, 452 U.S. at 679-80; *Ozark Trailers, Inc.*, 161 N.L.R.B. at 566. *Cf. NLRB v. Royal Plating & Polishing Co.*, 350 F.2d at 194-97 (discussing a facility closing).

301. *Ozark Trailers, Inc.*, 161 N.L.R.B. at 566.

302. *Brockway Motor Trucks*, 582 F.2d at 734.

would not necessarily mean subjecting the topic to mandatory bargaining.³⁰³

Unlike the result under the current test, the result under the proposed test would not "turn on whether the decision involves the commitment of investment capital, or on whether it may be characterized as involving 'major' or 'basic' change in the nature of the employer's business."³⁰⁴ Nor will the decision turn solely on factors as abstract as those in the *First National Maintenance* test.³⁰⁵ It is true that considerations of the benefit to the collective bargaining system as a whole, particularly in light of the language of Section 1 of the NLRA "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of . . . designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection,"³⁰⁶ and the degree to which a decision infringes on owners' rights "independently to rearrange [their] businesses,"³⁰⁷ will be factors. Additionally, however, the proposed test allows for and, since it has no predetermined outcome, encourages the parties to articulate situational and specific (as opposed to policy-oriented) reasons for or against subjecting the particular topic to bargaining. The owners, in order to avoid an NLRB remedial order to bargain in good faith, would be required to show the economic necessity of the relocation and the need for expediency in the actual situation at hand.³⁰⁸ Such needs would not be judicially or administratively assumed.³⁰⁹ The workers would likewise be required to produce practical considerations underlying their interests in order to provide the basis for the NLRB to issue a bargaining order against an unwilling employer.³¹⁰ Thus, the workers could show their accumulated pensions, years of service and other economic interests, and the effect of the company's leaving on their community.³¹¹ Conversely, the company could show its actual

303. Cf. *First National Maintenance*, 452 U.S. at 680-81 (discussing the purposes of the Act).

304. *Ozark Trailers, Inc.*, 161 N.L.R.B. at 566.

305. See, e.g., *Atleson*, *supra* note 33, at 99 (discussing the *Fibreboard* concurrence), 102-03 (discussing *United Auto Workers v. NLRB*, 470 F.2d 422 (D.C. Cir. 1972)) and 107-08 (discussing *First National Maintenance*).

306. 29 U.S.C. § 151 (1982).

307. *John Wiley & Sons*, 376 U.S. at 549.

308. *First National Maintenance*, 452 U.S. at 682-83. See also *supra* text accompanying note 295.

309. *Atleson*, *supra* note 33, at 107.

310. *Ozark Trailers, Inc.*, 161 N.L.R.B. at 566.

311. This is exactly what the administrative law judge in *United Steelworkers v. United States Steel Corp.*, 103 L.R.R.M. (BNA) 2925 (N.D. Ohio 1980) could not do.

economic harm if forced to negotiate. Since presumably the interests of each party in the situation presented in the hypothetical are, to that party, quite significant, the balance would be determined by the effect on the purposes of the NLRA of requiring collective bargaining on this topic.

If the philosophy behind *First National Maintenance* prevailed the presumed disadvantages to the employer would be weighed against the "incremental benefit" to the collective bargaining process gained by subjecting this decision to collective bargaining³¹² and the balance would be tipped in the employer's favor. In contrast, the proposed test would rely on the fact that "[t]he theory of the Act is that free opportunity for negotiation with the accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel."³¹³ It would hold that the subjects of mandatory bargaining should be flexible³¹⁴ and should be decided on a case-by-case basis with the opportunity for sharing of information and perspectives entailed by bargaining as a backdrop against which the decision should be made.³¹⁵ In the situation under discussion here, particularly since the parties will probably already be discussing the "effects"³¹⁶ of the proposed change, the opportunity for negotiations on a matter of such grave concern to employer and employee would not meet the unusual circumstance requirement (e.g., secrecy) under which a topic is peculiarly unsuitable for the bargaining process.³¹⁷

The topics included in this hypothetical would fall within the scope of mandatory bargaining under the proposed test unless peculiarities of the situation or the actual urgency of the employer's interests in this fac-

312. See *supra* text accompanying notes 289-96.

313. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. at 45 (cited in *First National Maintenance*, 452 U.S. at 678 n.16).

314. Contrast this with *First National Maintenance*, 425 U.S. at 684:

While evidence of current labor practice is only an indication of what is feasible through collective bargaining, and not a binding guide [citation omitted] . . . that evidence supports the apparent imbalance weighing against mandatory bargaining. We note that provisions giving unions a right to participate in the decision making process concerning the alteration of the scope of an enterprise appear to be relatively rare.

315. See, e.g., *Brockway Motor Trucks*, 582 F.2d at 734 ("Direct negotiations by the disputants are viewed as helpful . . . to the nation. . . .") See also NLRA § 1, 29 U.S.C. § 151.

316. *First National Maintenance*, 452 U.S. at 677, n.15. See *supra* note 286.

317. Discussion of the underlying decision, as well as its effects has been viewed, at least at one time, as a positive experience by the NLRB. Cf. *Ozark Trailers, Inc.*, 161 N.L.R.B. at 570 (on construction of the duty to bargain and the helpfulness of discussing the decision and its effects).

tual situation outweighed the quite substantial interests of the employees and their union. Since no such exceptional circumstances were mentioned in the hypothetical, the parties would be required to bargain about, but not necessarily to agree on, a decision to relocate and close the existing facility.³¹⁸

D. Summary

The purpose of this hypothetical was to test whether an issue of great interest to management and workers, and not incidentally, one about which *First National Maintenance* would probably not require bargaining, could be subjected to participatory processes without infringing on managerial prerogative. The European systems represent expansive uses of participatory mechanisms to resolve such questions. Both the German and Swedish systems recognize that there exists a point beyond which ownership rights of the shareholders would be infringed. Under these systems, the topic in the hypothetical was perfectly appropriate for such processes. Unlike the decision under the *First National Maintenance* standard, the proposed test would yield the result that, save in circumstances in which the need for secrecy or speed on the part of management were manifest, the topic would be ripe for mandatory collective bargaining. Despite this fact, the proposed test would not, as the European systems would not, require employer-employee agreement. It would merely determine whether a topic were suitable for worker input and, if so, subject it to a type of process in which management's ultimate power to reject worker ideas and to unilaterally make the decision is safeguarded. In short, the proposed test would not go farther than the European mechanisms in allowing worker codetermination of decisions with great impact on workers and management. Indeed, it does not afford as much room for participation since it merely requires good faith bargaining rather than agreement or consent, and only through the mechanism of collective agreement negotiation. In this way, it does not in any real sense infringe on truly managerial prerogatives.

318. Recall that:

[t]he employer has no obligation to abandon its intentions or to agree with union proposals. On proper subjects, it must meet with the union, provide information necessary to the union's understanding of the problem, and in good faith consider any proposals the union advances. In concluding to reject a union's position as to a mandatory subject, however, it must face the union's possible use of strike power. [citation omitted].

First National Maintenance, 452 U.S. at 678-79 n.17. See also *H.K. Porter Co.*, 397 U.S. 99 (1970).

IX. CONCLUSION

Discussing trends in the labor relations arena and comparative legal analysis are both risk-filled undertakings. This Note has attempted both of these tasks in order to give some perspective to the process by which the NLRB and United States federal courts tell the parties to a collective bargaining negotiation that they cannot use their relative economic power to reach agreements over "matter[s] of central and pressing concern to the union,"³¹⁹ particularly matters of job security. The test used by the United States Supreme Court to determine whether a topic is mandatory or permissive "is surely an odd one. Only one side of the balance is considered, and the interests conceivably involved do not have to actually be present."³²⁰ The worker participation programs established under statutory authority in Sweden and West Germany, while admittedly not capable of complete transfer to the United States in their extant forms, deal with these same concerns. They resolve issues of managerial control and prerogatives with considerable deference to the codetermination mechanisms in place while leaving (extraordinary) recourse to shareholders or the owner-representatives who compose the majority of the board of directors in case the process of joint determination does not yield a satisfactory solution. These programs shed some light on the degree to which a codetermination process can function without infringing on that "core" of entrepreneurial prerogatives which Western nations believe to be essential to the viability of corporate enterprises.

This Note presented a hypothetical situation with worker participation implications and three resolutions were discussed (one each for the European, the *First National Maintenance* and the proposed tests). The results of that discussion demonstrated that the proposed test would not go as far as the European mechanisms for worker participation. This was done to prove that this proposed test, a test with roots in United States case law prior to the *First National Maintenance* decision, and a test which is more sympathetic to the interests and desires of the workers, need not reach the point of infringing on truly managerial prerogatives. This test not only gives appropriate attention to the interests of the managers and owners, but it uses a true balancing of interests: the interest of the workers and their union, the benefits to the labor-management

319. *First National Maintenance*, 452 U.S. at 677.

320. Atleson, *supra* note 33, at 107. See also *First National Maintenance*, 452 U.S. at 689 (Brennan, J., dissenting) ("I cannot agree with this test, because it . . . fails to consider the legitimate employment interests of the workers and their union.").

relations environment and collective bargaining process gained by subjecting a topic to mandatory bargaining, and the interest of the management and owners in running a profitable business and safeguarding the viability of the entity.

The Western European experience provides a guide as to where the line between appropriate and inappropriate subjects for codetermination can be drawn with an eye toward industrial democracy and without infringing on the rights of the managers and owners of the enterprise. Therefore, if United States courts wish to honor the legislative intent of Congress to afford broad scope to the subjects of collective bargaining and to protect the interests of all the parties (workers as well as owners) without infringing on management's "need" for some prerogatives in the appropriate circumstances, and if they wish to honor the values of the NLRA in promoting worker participation in the decisions of management which affect working life, the courts should adopt the more flexible test advocated herein.